80-933

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Supreme Court of the United States

October Term, 1980

No.

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, CEDARS-SINAI HOUSE STAFF ASSOCIATION, UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS HOUSE STAFF ASSOCIATION, AND ST. CHRISTOPHER'S HOSPITAL HOUSE STAFF ASSOCIATION,

Petitioners,

v.

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN A. PENELLO, PETER D. WALTHER, and JOHN H. FANNING, individually and as Chairman and Members of and constituting the National Labor Relations Board,

Respondents.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Parties in the Court of Appeals

The parties named in the caption herein were the parties in the Court of Appeals in the District of Columbia. The Committee of Interns and Residents ("CIR") was a plaintiff-appellant in that appeal but not a petitioner here.

Questions Presented

1. Whether determinations by the National Labor Relations Board ("NLRB") that medical interns, residents and clinical fellows (collectively called "house staff") at non-profit hospitals, "although they possess certain employee characteristics, are primarily students," not employees covered by the National Labor Relations Act ("NLRA"), and that, as a matter of pre-emptive national labor policy, such house staff cannot be covered by state or local labor relations legisla-

tion, are, as was held in the courts below, subject to no judicial review?

2. Whether the described NLRB determinations are consistent with the applicable provisions, history and purposes of the NLRA?

3. Whether the described NLRB determinations violate the Tenth Amendment?

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Petitioners,

v.

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN A. PENELLO, PETER D. WALTHER, and JOHN H. FANNING, individually and as Chairman and Members of and constituting the National Labor Relations Board,

Respondents.

———————0———————

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered

herein on July 11, 1980.

Opinions Below

The opinion of the District Court is reported at 443 F.Supp. 806 (D.D.C. 1979), and is reproduced as Appendix ("App.") V, infra. The original opinion of the Court of Appeals is not officially reported, but is reported at 100 LRRM 3055 (1979) and is reproduced as App. III, infra. The opinion of the Court of Appeals en banc after rehearing is not officially reported, but is reported at 104 LRRM 2940 (1980) and is reproduced as App. II, infra.

Jurisdiction

The Court of Appeals for the District of Columbia Circuit entered judgment, affirming the order and judgment of the United States District Court for the District of Columbia dismissing the complaint

and entering judgment in favor of the defendants, on July 11, 1980. On September 30, 1980, the Chief Justice granted petitioners' application for an extension of time in which to file this petition for certiorari in this Court to and including December 8, 1980.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Constitutional and Statutory Provisions Involved

See App. I, infra.

Statement of the Case

1. Preliminary Statement

This is an action brought on behalf of the house staff at the private, non-profit Cedars-Sinai Medical Center ("Cedars-Sinai"), University of Chicago Hospital and Clinics ("U/Chicago"), St. Christopher's Hospital for Children ("St. Christopher's"), and St. Clare's Hospital and

Health Center ("St. Clare's") (collectively referred to as "the hospitals"), by the petitioners herein, unincorporated membership house staff associations at the hospitals and the Physicians National House Staff Association ("PNHA"), a national organization of house staff with which the aforesaid local house staff associations are affiliated, against the respondents herein, the members of the NLRB, arising out of NLRB determinations dismissing the petitioners of those local house staff associations for certification as the collective bargaining representative of their respective house staffs under the NLRA. The NLRB ruling was that house staff are not employees and therefore the petitioners not labor organizations within the meaning of the NLRA.

The action was instituted in the District Court for the District of Columbia.

The complaint alleges that the NLRB determinations are in conflict with the NLRA, including specific NLRA mandates and prohibitions, and with the Fifth and Tenth Amendments. Declaratory and injunctive relief was sought which would require the NLRB to process petitioners' applications for certification. App. XI, XIII. The answer is essentially a general denial of the claim that house staff are employees under the NLRA and the defense that the NLRB determinations were not final orders subject to judicial review. App. XII, XIV.

Respondents moved for dismissal of the complaint for lack of subject-matter jurisdiction or, in the alternative, for summary judgment. App. XV. The motion was not supported by any affidavit addressing the allegations in the complaint, but relied upon the answer and the records of the proceedings before the NLRB. Peti-

tioners cross-moved for summary judgment in their favor.

The United States District Court for the District of Columbia granted the motion of respondents, denied the motion of petitioners, and dismissed the case for want of jurisdiction on the ground that the NLRB determinations were not subject to judicial review. App. V. The United States Court of Appeals for the District of Columbia originally reversed the District Court judgment and remanded for further proceedings consistent with the majority opinion of Chief Judge Wright, joined in by District Court Judge Richey and dissented from by Circuit Judge Robb, that house staff coverage under the NLRA was so clear that failure to provide such coverage warranted District Court jurisdiction under Leedom v. Kyne, 358 U.S. 184 (1958). App. III. On motion of respond-

ents, the Court of Appeals ordered en banc that the appeal be reheard en banc (App. IV), and after re-argument affirmed the District Court, with a majority opinion by Judge Robb, over the dissent of Chief Judge Wright joined by Circuit Judges Robinson, Wald and Mikva (App. II).[1/]

2. The Facts

House staff officers are college and medical school graduates, licensed physicians or otherwise legally authorized to provide medical care at hospitals, who provide such care to hospital patients as part of an American Medical Association ("AMA") accredited hospital-based training program in a medical specialty or subspecialty. See AMA Liaison Committee on Graduate Medical Education, Directory of

1/Circuit Judge Leventhal participated in the argument but died before the opinion issued. Circuit Judge Edwards did not participate in the argument or decision.

Accredited Residencies 1977-78 (1977) ("Residency Directory") at 333-40. The satisfactory completion of such a training program qualifies a house staff officer to take an AMA specialty board examination which, if passed, results in certification in the speciality by that board. Id. at 367. Certification is not a legal prerequisite to the practice of a specialty. The described training program consists of patient care as well as academic activities. Id. at 333-38.

The complaint here alleges that:

> "(i) All the house staff officers involved render medical services to patients at the Hospitals at which they work and train, and those house staff officers devote most of the time expended by them at their respective Hospitals to performing such services.
>
> (ii) The services thus performed by house staff officers are subject to the direction and control of the Hospitals at which those services are performed.

(iii) The house staff officers involved receive salaries and/or stipends, and other forms of compensation and benefits, from the Hospitals and related institutions at which such services are performed by house staff.

(iv) The Hospitals are compensated or reimbursed for the services thus performed by their house staff officers, by or on behalf of the recipients of those services....

29. The house staff officers at the Hospitals are and at all material times have been employees for all relevant and material purposes, including but not limited to federal and state income taxation.

30. House staff officers at other institutions, engaged in work and training essentially like that of the house staff at the Hospitals, have been uniformly determined to be employees for all purposes, including but not limited to federal and state taxation, state and local voting residence, agency law, workmen's compensation, federal veterans reemployment rights, and state and local labor relations legislation and regulation." (348-50).[2/]

Further, according to the complaint, the

2/Reference to pages in the attached appendices will be designated in parentheses.

PNHA and the local house staff associations have represented house staff in matters of employment, in some instances pursuant to labor board certification and since 1957. (327-34). These allegations are not contradicted by any evidence submitted by respondents herein.[3/]

3/Respondents entered only conclusory denials as to the referenced portions of the complaint (372-94), accepted "as true" for purposes of respondents' motion "all of the facts alleged in the plaintiffs' complaint...which concern matters outside the record of the Board's proceedings and decisions upon which this lawsuit is based" (413), and relied upon the latter only as to denials of allegations pertaining to those proceedings and decisions (414). The transcripts of the NLRB proceedings are filed with this Court in connection with the instant petition and we believe that it will not be seriously disputed that they amply support the evidentiary matter, as distinct from the legal conclusions, in the complaint referenced in the text. The nature of the work performed by house staff as alleged in the complaint has been authoritatively confirmed in a study of 1400 teaching hospitals in the United States by a study, sponsored by the United States Department of Health, Education and Welfare

Continued

Prior to 1974 the NLRA excluded employees of charitable non-profit institutions from its coverage. Effective August 25, 1974, that exclusion was dropped upon the enactment of the NLRA Health Care Amendments by Public Law 93-360, 88 Stat. 395, 93d Cong., 2d Sess. (1974) ("PL 93-360"), which also added notice, mediation, and fact-finding procedures in connection with disputes and strikes in non-profit health care institutions. NLRA §§8(d), 8(g), 213; 29 U.S.C. §§158(d), 158(g), 183.

In 1974 and 1975 each of the petitioners herein filed petitions for certi-

3/Cont'd. - pursuant to law, which found that 84% of the time of a house staff officer is devoted to patient care; 10% to "learning', 3% to "research," and approximately 60% in patient care and teaching without direct supervision. Institute of Medicine, Medicare-Medicaid Reimbursement Policies, Final Report, ch. 4 ("Graduate Medical Education") (March 1976) at 12, Table 6.

fication pursuant to NLRA §9(c), 29 U.S.C.§ 159(c). Objections were raised by the hospitals, and NLRB Regional Office hearings were held. After those hearings, and before decision, all the cases were transferred to the NLRB for decision. All the cases were thereafter scheduled by the NLRB for oral argument before the NLRB on September 8, 1975, and the PNHA permitted to participate as amicus curiae, by reason of the NLRB determination that those cases presented issues of importance to the administration of the NLRA in the health care industry. (339-42).

On March 19, 1976, in the first NLRB decision involving house staff, the NLRB held (Member, now Chairman, Fanning dissenting) that although house staff "possess certain employee characteristics, [they] are primarily students," and "not 'employees' within the meaning of Section

2(3) of the Act," that their house staff organization is therefore not a labor organization within the NLRA, and that the petition must be dismissed. Cedars-Sinai Medical Center, 223 NLRB 251 (1976) (App. VIII) ("Cedars-Sinai"). The same conclusion was reached by the NLRB in every subsequent house staff case.[4/] Each of the cases was decided by the NLRB (Member Fanning dissenting) without discussion of the house staff involved, but with the

4/St. Christopher's Hospital for Children, 223 NLRB 166 (1976); University of Chicago Hospitals and Clinics, 223 NLRB 1032 (1976); St. Clare's Hospital and Health Center, 223 NLRB 1002 (1976); Buffalo General Hospital, 224 NLRB 76 (1976); Kansas City General Hospital, 225 NLRB 110 (1976) ("Kansas City I"); Wayne State University, 226 NLRB 1062 (1976); Barnes Hospital, 224 NLRB 552 (1976); Deaconess Hospital of Buffalo, 226 NLRB No. 164 (1976); see also Clark County Mental Health Center, 225 NLRB 780 (1976). Member Truesdale joined Chairman Fanning in dissenting from Cedars-Sinai in Samaritan Health Services, 238 NLRB No. 56 n.16(1978).

conclusory finding only that the house staff "are not unlike those" in Cedars-Sinai. (343-45).

The NLRB majority in Cedars-Sinai first reviewed the educational conponents of house staff training programs (178-83), then asserted that house staff are paid "on a graduated basis," dependent upon years in the program, without regard to the hours or nature of services (184).[5/] The majority noted that "housestaff also received a variety of fringe benefits, such as medical and dental care, an annual vacation and paid holidays, uniforms, meals

5/Contrary to the indicated view of the NLRB, specialty boards mandate increase in responsibility in each ensuing year of residency (Residency Directory at 338) as salaries increase. See also American Association of Medical Colleges ("AAMC")-AMA, Program Cost Estimating in a Teaching Hospital: A Pilot Study 86 (1969) ("the value of their [house staff] services increases steadily as the residency progresses, and...in the advanced years

Continued

while on duty, and malpractice insurance," but added that house staff are not eligible for the hospitals' retirement plan (ibid).[6/] House staff tenure at Cedars-Sinai generally ends with the completion of the training program.(185-86).

From the foregoing factors, the majority concluded that house staff:

> "...participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine....While the housestaff spends a great percentage of their time in direct patient care, this is simply the means by which the learning process is carried out. It is only through this direct involvement with patients that the graduate medical student is able to acquire the necessary diagnotic skills and experience to practice his profession. ...Nor does it appear that those applying for such programs

5/Cont'd. - of their residencies the quality of their services reaches a very high level").

6/Exclusion from a pension system has been considered irrelevant to the issue of NLRA coverage. Niagara University v. NLRB, 558 F.2d 1116, 1121 (2d Cir. 1977).

attached any great significance to the amount of the stipend." (186-86).7/

The NLRB majority in Cedars-Sinai did not cite any NLRB or court precedent, or any legislative history, or any other authority of any kind. Nor does the Cedars-Sinai majority mention a national labor policy or any other policy implicated by its decision. Three members of the Cedars-Sinai majority later acknowledged that "[m]uch of the blame for this misunderstanding [of the policy considerations underlying Cedars-Sinai] can perhaps justifiably be laid at our feet for we may not have

7/It has been held that factors other than salary motivating career choices are not an appropriate inquiry for the NLRB (Niagara University v. NLRB, supra, 558 F.2d at 1120-22; NLRB v. St. Francis College, 562 F.2d 246, 250-55 [3d Cir. 1977]), a conclusion particularly warranted by the NLRB's experience with evaluating the money needs and interests of religious faculty which resulted "at best [in] a morass with which this Board has no special expertise to deal" (Niagara University, 227 NLRB No. 33, n.6 [1976]).

been as precise as we might have been in articulating our views." (263-64).

Respondents acknowledged that Cedars-Sinai was "viewed by many as an aberration in national labor policy..." (264). The dissent of Member Fanning showed why. He first observes:

> "Section 2(3) of the Act states that the term 'employee' is meant to 'include any employee...unless the Act explicitly states otherwise,' and proceeds to explicitly state those excluded from the definition, e.g., agricultural laborers, domestic servants, et al. 'Students' are not among those exclusions. Recognition of an underlying Federal policy which seeks to draw a line between labor and management has further led to the exclusion, on such policy grounds, of the additional classes of 'employees,' namely, confidential and managerial employees. That is all." (195).

He then pointed out house staff are within the ordinary common law definition of "employee" as one who performs service for another for compensation (196-99), so that hospitals are, for example, subject to

vicarious liability for the acts of their house staff (198-99). The services performed by housestaff for the foregoing purposes are described as follows:

> "The records before us demonstrate, for example, that housestaff officers, without immediate supervision of any kind, continually deal in matters literally of the ultimate significance. That they do is a function, no doubt, of their hours. The housestaff work round-the-clock, 7 days a week, 52 weeks a year. No other physicians do. They perform their services, on an individual basis, for periods lasting, at times, well over 100 hours a week, in shifts that often exceed 50 consecutive hours. They singly staff emergency rooms, frequently at times when their supposed 'teachers' are not even in the facility. That accounts for the record facts which demonstrate that, without supervision, a housestaff officer can be called upon, to open the chest wall of a 3-year-old child; hold the heart of a patient in his hands; remove breast tissues, kidneys, veins; deliver babies, insert tubes in the tracheae of newborns and catheters into abdominal cavaties; administer closely controlled and potentially lethal medications; and for a host of similar procedures.
>
> For those services and innumerable others supervised by medical staff but performed by housestaff, the hospital charges fees in amounts which have

> sparked national debate. In return for those services, the hospital pays that housestaff officer what my colleagues call a 'stipend." It exceeds, in some cases of multiple residencies, $20,000 a year. From that 'stipend,' the hospital withholds Federal and state taxes, contributes to social security, and provides for health insurance. The hospital grants vacations and sick leaves, laundry allowances, etc. For the negligent performance of those services the hospital can be sued. For those services the housestaff receives...no degree, no grades, no examinations." (200-20) (emphasis in original).

Authoritative AMA guidelines and instructions in contemplation of house staff status as employees are cited. (203-06). And with respect to the majority's reference to greater interest of house staff in quality of training as compared to rate of compensation, the dissent observed:

> "That is, hopefully, not a unique approach in any field of endeavor, particularly professional ones....
>
> I fail to perceive how the fact that an individual desirous of becoming an orthopedic surgeon chooses a residency program based on its quality and the opportunity for extensive

> training bears relevance to the question whether, having done so, he or she is an 'employee' under the Act." (206-08).

The dissent then turned to the applicable statutory language and history. He first dealt with NLRA §2(12), 29 U.S.C. § 152(12), which defines the term "professional employee":

> "Section 2(12) was, in part, designed to cover housestaff specifically. In the words of the House Conference Report accompanying the Taft-Hartley amendments to the Act, the section was designed to embrace 'such persons as legal, engineering, scientific and medical personnel together with thier junior professional assistants' and, as the language of Section 2(12)(b) so clearly states, included in the definition of professional employee are individuals who have completed courses of specialized instruction and are performing related work under the supervision of Section 2(12)(a) professionals. The definition fits, precisely, housestaff officers." (210-11) (emphasis in original).

Member Fanning then adverted to the legislative history of PL 93-360:

> "A large segment of the committee hearings on the recent amendments

was devoted to the testimony, statements, and accompanying documents of representatives of the housestaff in support of the amendments. For the most part, the testimony concerned itself with the contention advanced by the Physicians National Housestaff Association, amicus here, that housestaff officers should be excluded from the ambit of Section 2(11) of the Act, which sets forth the definition of 'supervisor,' because housestaff officers do not exercise supervisory authority 'in the interest of the employer.' At no time during the course of the hearings was even a mention made that housestaff officers, because 'students,' might not be entitled to coverage under the Act. In point of fact, any reasonably diligent reading of the legislative history surrounding the amendments would make it clear that coverage of housestaff, in some context, was an assumption on the part of Congress. That is evident when one considers the congressional [committees'] response to the housestaff representatives' contention that amendment of Section 2(11) was necessary:

> 'Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of 'supervisor'. The Committee has studied this definition with particular reference to health care professionals, such as...interns, resident, fellows...and concludes that

> that proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of a 'supervisor' to a health care professional who gives direction to other employees, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.' (Emphasis supplied.)

Throughout the debates on the floors of both Houses, again, no mention of the 'student' status of housestaff officers can be found. Senator Cranston, co-sponsor and floor manager of the Senate bill, indicated, on the other hand, that one of the conditions the bill was designed to redress was the 'notoriously underpaid... average annual salary for all hospital employees--including doctors.... According to [the] president of the Physicians National Housestaff Association, the average house staff officer--intern, resident, or fellow--works 70 to 100 hours per week, and earns about $10,000 per year. His hourly wage, then ranges from $1.92 to $2.74.' The majority's response to the above legislative history bears repeating:

> As we have found...that interns, resident, and clinical fellows are not employees...we find no merit in Petitioner's contention that they are employees based on Sec. 2(11)....

Obviously, no petitioner has contended that it represents 'employees' because it represents 'supervisors.' And yet, that, apparently, is how my colleagues dismiss the compelling argument that, in treating the question of amendment to Section 2(11), Congress clearly and explicitly recognized housestaff as employees.

It is clear to me, as the language of Section 2(12) states, the legislative history of Section 2(12) states, the committee Reports on the hospital amendments state, and Senator Cranston states in explanation to his colleagues, that housestaff officers are covered by this Act." (212-16).

...in considering how to minimize the potential for disruption of medical services inherent in an amendment granting significant numbers of employees the right to strike, Congress, realizing that recognitional strikes do not cease because outlawed, considered it the wiser course to make available the provisions of this statute for the orderly resolution of such recognitional struggles: 'The Committee was also impressed with the fact, emphasized by many witnesses, that the exemption of nonprofit hospitals from the Act had resulted in numerous instances of recognition strikes and picketing. Coverage under the Act should completely eliminate the need for any such activity, since the procedures of the Act will be available to resolve organizational and recognition disputes.'

> And so there is a pathetic irony in what my colleagues do today. The onset of organization of housestaff officers is among us. Fewer cases may come to this Agency, but as many will come to the training hospitals. The one group so singularly involved in the congressional issues, both in terms of its immediate relationship with the delivery of medical services and in terms of its recognitional interests, is, today, by fiat, read out of the Act." (217-19) (emphasis in original).

Following Cedars-Sinai the CIR commenced proceedings first before the New York State Labor Relations Board ("SLRB")[8/] and then in the New York state courts[9/] to reinstate the pre-PL 93-360 SLRB jurisdiction over New York house staff (see infra at n.30), in view of their exclusion from NLRB jurisdiction under Cedars-Sinai. When the New York State Supreme Court authorized such SLRB jurisdiction, citing the NLRB de-

8/See Misericordia Hospital Medical Center, 39 SLRB No. 32 (1976).

9/See Committee of Interns and Residents v. SLRB, 88 Misc.2d 502, 388 N.Y.S.2d 509 (Sup. Ct. N.Y. County 1976).

cision in Kansas City I as grounds,[10] the NLRB on November 9, 1976, sua sponte, "revised" its decision in Kansas City I in the form of Kansas City General Hospital, 225 NLRB No. 14A (1976) (App. IX) ("Kansas City II").[11] This NLRB determination (Member Fanning again dissenting) was expressly directed at the state court decision, "disavowed" the language in Kansas City I relied upon by the state court, and declared that Cedars-Sinai and the other NLRB house staff decisions involved a matter of "national labor policy" (not further explained) and were intended to preempt and oust all state and local governments from jurisdic-

10/The NLRB there indicated an absence of NLRA jurisdiction over the hospital as well as over house staff.

11/Kansas City II involved none of the parties concerned in the New York litigation, and the issue of preemption had not been raised or argued in that case. (246-47).

tion over voluntary hospital house staff labor matters.

One week after Kansas City II, the NLRB commenced a proceeding, in the United States District Court for the Southern District of New York, to enjoin the SLRB and the CIR from proceeding with the implementation of the original state court ruling authorizing SLRB jurisdiction. The NLRB claimed that the SLRB was ousted of jurisdiction by reason of preemption. The District Court rejected the NLRB preemption claim, denied the NLRB motion for an injunction, and granted the CIR cross-motion for summary judgment.[12/]

On May 27, 1977, following the decision of the District Court and shortly

12/NLRB v. Committee of Interns and Residents, 426 F.Supp. 438 (S.D.N.Y. 1977) (App. VII).

after the filing of the NLRB appeal to the Court of Appeals for the Second Circuit, the NLRB rendered its decision in St. Clare's Hospital and Health Center, 229 NLRB No. 158 (App. X) ("St. Clare's"), denying a motion for reconsideration pending and undecided since April 27, 1976. A national labor policy concerning house staff labor relations, not previously stated by the NLRB or discernible to the District Court in NLRB v. CIR (167-68), was now articulated (260-85). Chairman Fanning dissented. (286-308). Member Jenkins concurred only in the result, and stated that it was otherwise "necessary that I disassociate myself from the majority view" because he "disagree[d] wholly" with the "seeming willingness [of the majority] to regard any employees who also engage in structured studies as per se being somehow and in some respects disqualified from

union representation." (285-86). Former Chairman and then Member Murphy stated that she "is sympathetic to Member Jenkins' concurrence," but, "under the circumstances of this case,[13/] she joins the majority herein." (309-10).

Thus constituted, the majority in St. Clare's, after acknowledging "uncertainty" and "misunderstanding" caused by the NLRB as to "the precise effect of the 1973 health care amendments on the status of house staff," undertakes "to clarify our view of the relevant legal principles." (261-63). According to the St. Clare's, majority, "Cedars-Sinai is consistent with, and reflective of, long-

13/Nothing further appears in St. Clare's to explain or clarify the "circumstances" thus referred to. The decision does not discuss any facts or "circumstances" relating directly to St. Clare's Hospital.

standing national labor policy as developed and articulated by this Board." (264). In support of this proposition the majority cites various categories of past NLRB decisions (265-71), none of them applicable according to Chairman Fanning's dissent (296-306) which he prefaces with the observation that the NLRB "'policy' to which the majority alludes does not, so far as is relevant here, exist. That is to say, there is not, nor has there ever been, any 'longstanding' policy which denies representation rights completely to 'students' who are also 'employees' within the meaning of" the NLRA." [14/] (295).

14/Chairman Fanning was appointed to the NLRB in 1957 (94 LRRM 321), and has the longest tenure of any member of the NLRB. Member Jenkins is the next senior member. (320). Chairman Fanning noted that, with Member Jenkins, he "cannot recall how this particular policy about 'students' came to be." (Ibid.).

The St. Clare's majority added various policy considerations to those it found reflected in prior NLRB cases. The mutual interest of the student-teacher relationship in education is said to be so at variance with the conflicting interests in the employer-employee relationship that injecting collective bargaining into the former "would, in our judgment, prove detrimental to both labor and educational policies." (271-73). Collective bargaining is considered by the majority to be "the very antithesis of personal individualized education." (273). According to the majority opinion, "the student-teacher relationship is an inherently inequalitarian one" with respect to which collective bargaining is "an anathema." (274). "Academic freedom" as to matters such as curriculum, examinations, and advancement would become "bargainable." (274-75). The "long hours"

which, the majority acknowledges, house staff officers "work notoriously" pursuant to "educationally sound" reasons, "could become bargainable." (276-76). And subjective assessment of house staff performance, pursuant to which continuation in or dismissal from a training program (and therefore career) is determined, "would be tantamount to discharge and thus a mandatory subject of bargaining," subject ultimately to arbitration which the St. Clare's majority considers an inapprorpiate modality. (276-77).[15/]

15/By way of contrast, the Joint Commission for Accreditation of Hospitals, Accreditation Manual for Hospitals: 1970 Updated 1973 at 42-43 (1973), requires peer review and ultimately review by a lay governing body in the event of failure of a hospital to appoint or reappoint a staff or attending physician to the medical staff. More than 90% of reporting private non-profit hospitals with collective bargaining contracts covering professionals, provide for arbitration of disciplinary matters. 51 American Hospital Association ("AHA") Journal: Hospitals 67, 71-73 (May 1, 1977).

Chairman Fanning responded to all this as follows:

> "...housestaff, if indeed 'students,' are unlike any others and...the hospitals at which they work, if indeed 'educational institutions,' are unlike any others. The former proposition is self-evident, I submit. I am not aware of any of the 'students' in the cases to which my colleagues allude having, but for one example, legal authority to make incisions in other human beings. The denomination of the institutions involved as 'educational' is equally in appropriate. All of the educational facilities found in the cited cases, unlike all of the hospitals found in the housestaff cases, were incorporated under applicable state education laws. Of course, that they were merely reflects that the State, as well as the legislative history of the amendments, which at no point, as far as I can find, referred to any 'educational' institutions being added to Board jurisdiction, discerned the obvious differences between universities and hospitals." (291-92) (emphasis in original).

> "In the final analysis, it is the height of absurdity for Congress to enlarge this Board's jurisdiction, to encompass the vast bulk of health care institutions in this country for the avowed purpose of minimizing the potential disruptions of health care delivery posed by organizational efforts of individuals not covered by

> Federal regulation until the amendments, and then, for this Board, upon some notion that the decisional basis for the question of coverage is found in 'precedent' involving student janitors, science graduate assistants, and physics majors, to leave without regulation those in the forefront of organizing activity in the health care field, doctors. And, as Judge Stewart indicated in his opinion, the recent strikes at various New York City hospitals are the direct result of Cedars. They were also completely incompatible with the amendments and precisely the threat sought to be cured." (306-07).

Following St. Clare's the Court of Appeals for the Second Circuit reversed the District Court in the proceeding brought by the NLRB against the CIR (566 F.2d 810 [1977]) (App. VI), and certiorari was denied (435 U.S. 904 [1978]). By that time the instant action had already been instituted. The Second Circuit held that "it is clear that Congress intended to include housestaff within the coverage of" PL 93-360 (131), that Congress had, in conjunction with such coverage, pre-empted the states (130-34), that the NLRB was there-

fore authorized to make a pre-emptive determination on the subject (131-32), and that "[i]f the NLRB abused its discretion in Cedars-Sinai, those proceedings [i.e., the instant action] will correct the error" (135). In the District of Columbia, however, as indicated, the District Court and, ultimately, the Court of Appeals held that they were without jurisdiction to review or correct the NLRB determinations.

Reasons for Granting the Writ

I

THE HOLDING BELOW FORECLOSES ANY JUDICIAL REVIEW OF THE NLRB DETERMINATIONS AND IS THEREFORE IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The majority on re-hearing below considered that since the NLRB determinations were made in the context of a representation, not an unfair labor practice ("ULP") proceeding, and the NLRA contemplates Circuit Court judicial review, and there only

of final ULP orders of the NLRB (NLRA §§9[d], 10[e], [f], 29 U.S.C. §§159[d], 160[e], [f]) (hereinafter collectively referred to as "§10"), ordinary District Court equity jurisdiction under 28 U.S.C. §1331 and 1337 can be invoked only in the extraordinary circumstances of Leedom v. Kyne, supra ("Kyne"), where the NLRB had violated an express proscription or mandate of the NLRA, and the action here fails because the NLRA does not, in so many words, mandate coverage of house staff. The majority "agree" that in their analysis, the NLRB determinations, as any other NLRB denial of representation, "may evade all judicial review" (20), even if the NLRB were to "decide that workers such as plumbers or carpenters are not 'employees'" (22), or render "a series of arbitrary or irrational decisions" (23), as well as here where those determinations foreclose state and local,

not just national, labor relations law coverage of house staff (22).

The original majority opinion and the dissent on re-hearing below thoroughly explicate the respects in which the majority's views on re-hearing conflict with §10 holdings and views of this Court (23-52, 54-76), and we rely on, without repeating the substance of the opinions of Chief Judge Wright. Our discussion is confined to matters not there covered or emphasized.

(1)

This Court has recognized that coverage of health care facilities under the NLRA by PL 93-360 was motivated by profound concern for the safety and welfare of patients placed at risk by the labor instability presumably minimized by such coverage. Beth Israel Hospital v. NLRB, 437 U.S. 483, 496-500, 505, 507-08, 509, 513-14 (1978) ("Beth Israel"); NLRB v. Baptist Hospital, Inc., 442 U.S. 773, 783-

84, 789-90 (1979) ("Baptist Hospital"). That concern extended in the cases cited to the careful drawing and judicial review of NLRB rules to govern union solicitation at hospitals lest such activity disturb patient care. Beth Israel, supra; Baptist Hospital, supra; see also NLRB v. Baylor University Medical Center, 439 U.S. 9 (1978), ("Baylor"). In the described setting this Court noted that NLRB rules are "judicially reviewable for consistency with the Act" (Beth Israel Hospital, supra, 437 U.S. at 501); "the courts have the duty to review the Board's presumptions both 'for consistency with the Act, and for rationality'" (Baptist Hospital, supra, 442 U.S. at 787).[16/] Here, however, where we deal with

16/See also, to the same effect, NLRB v. Yeshiva, 444 U.S. 672, 691 (1980). Mr. Justice Brennan has joined in the cited formulation even where he has dissented from its application in the hospital cases. See Baptist Hospital, supra, 442 U.S. at 797; Baylor, supra, 439 U.S. at 12; see also NLRB v. Yeshiva, supra, 444 U.S. at 692-94.

house staff who provide essential medical services to hospital patients which, if interrupted, causes not merely disturbance by union solicitation but threatens total disruption of patient care, the courts below have held that there is no judicial review to determine consistency with the NLRA, or even rationality, of NLRB rules which enunciate, as a matter of "national labor policy," that no house staff anywhere in the nation shall have access to statutory mechanisms believed, on the basis of past health care experience (Fanning, "The Health Care Amendments," NYU 29th Annual Conference on Labor, 201, 203-05 [1976]), to maximize labor peace and stability. It cannot be that anything in the NLRB's experience in respect of its jurisdiction over health care facilities or related areas of NLRA coverage of professionals assures that the NLRB is less needful of judicial review there than

elsewhere. See Beth Israel, supra, 437 U.S. at 513 n.4 (Powell, J., concurring); NLRB v. Mercy Hospital Ass'n, 606 F.2d 22, 25-28 (2d Cir. 1979), cert. den. 100 S.Ct. 1665 (1980); Fanning, op. cit. supra, at 210-18; see also NLRB v. Yeshiva, supra; NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

The decisions below, granting insulation of the NLRB determinations from the accountability implicated by judicial review, are, in any event, of vast importance. The NLRB house staff decisions impact directly, locally and nationally, on extraordinarily sensitive, substantial and extensive interests. The decisions below accept the doctrine that such administrative rulings can be wholly immune from judicial review or remediation. The District of Columbia Circuit Court of Appeals considered the issues weighty and difficult enough to convene and decide them en banc, and was

so divided on the issues as to be able to reach only a bare majority. We believe the matter demonstrably of an order of magnitude warranting this Court's review.

(2)

The complaint's jurisdictional bases of 28 U.S.C. §§1331 and 1337 constitute the historical grounds for equitable relief by a District Court where a federal agency acts arbitrarily or in excess of statutory or constitutional authority.[17/] The rule established by this Court is that such equity jurisdiction may be defeated only where there is "clear and convincing evidence" that the Congress intends to deny judicial review. Abbott Laboratories v.

17/See Jaffe, "The Right to Judicial Review," 71 Harv.L.Rev. 401 (1958); Berger, "Administrative Arbitrariness: A Synthesis," 78 Yale L.J. 965, 966-67 (1969); Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 860-63 (4th Cir. 1961).

Gardner, 387 U.S. 136, 140, 141 (1967); Rusk v. Cort, 369 U.S. 367, 379-80 (1962); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Dunlop v. Backowski, 421 U.S. 450, 567 (1975).[18]

An NLRB order in a representation proceeding was never intended, as respondents must show by "clear and convincing evidence," to be immunized from judicial review. When an NLRB representation determination (such as a unit determination or certification) is ultimately incorporated in an ULP order, the determination and the ULP order are reviewable as to arbitrariness, or abuse of

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18/In connection with judicial review of an NLRB order in a representation proceeding, the Court noted that "members of the Board, concede...that the District Court had jurisdiction of the suit under... §1337, unless the review provisions of the National Labor Relations Act destroyed it." Kyne, supra, 358 U.S. at 187; see also American Federation of Labor v. NLRB, 308 U.S. 401, 404, 412 (1940).

discretion, or of statutory authority, by the appropriate United States Court of Appeals. No reason appears why §10 reviewability in the foregoing circumstances should be grounds for the ruling below that no judicial review exists where, as here, the representation determination is final and never becomes the subject of an ULP order. Indeed, by its terms §10(f) is not confined to ULP orders, only to final orders.

This Court has held that the availability of statutory review in one aspect of agency action, does not usually foreclose or limit statutory review in a different aspect of agency action. Abbott Laboratories v. Gardner, supra, 387 U.S. at 141; Dunlop v. Backowski, supra; Citizens, etc., v. Volpe, supra. It is, therefore, here decisive that the legislative history of §10 shows no purpose or intent to deny judicial review of arbitrary or

unauthorized NLRB action (24-26), whether that action is by way of a representation determination or an ULP order. At most, §10 defers judicial review until unit and certification matters are incorporated in an ULP order so that unit determination and certification may proceed without delay. But when, as here, such delay is not at risk, nothing in the origins of §10 suggests that it authorizes the foreclosure of judicial review sustained below. In no event does §10 constitute the clear and unequivocal evidence of a legislative purpose to deny all judicial review which is required by the decisions of this Court as a condition of such denial.

(3)

In American Federation of Labor v. NLRB, 308 U.S. 401 (1940), the Court carefully confined its holding to the proposition that §10 would not sustain review of

an NLRB order of certification in the Court of Appeals in the first instance, as distinct from review in the District Court under §1337. Id. at 404-05, 412.

Hotel Employees Local No. 225 v. Leedom, 147 F.Supp. 306 (D.D.C. 1957), aff'd 249 F.2d 506 (D.C. Cir. 1957), rev'd 358 U.S. 99 (1958), involved an NLRB order dismissing a hotel employees' union petition for representation. Jurisdiction was declined by the NLRB on the basis of a long-standing NLRB policy not to exercise jurisdiction over the hotel industry. The District Court held that equity jurisdiction existed to determine whether the NLRB action was arbitrary or unauthorized (147 F.Supp. at 307-08), but then concluded that the action was not arbitrary (id. at 308-09). The Circuit Court affirmed without opinion. Judge Fahy dissented, noting particularly the "[j]urisdiction in the District Court

to entertain the action." 249 F.2d at 508. This Court reversed on the merits, thus affirming jurisdiction, and later indicated that Hotel Employees sustained equity relief in the District Court absent §10 judicial review. Hanna Mining Co. v. District 2, Marine Engineers, 382 U.S. 181, 190 (1965). None of the "extraordinary circumstances" required by the courts below here were present in Hotel Employees.[19/]

Kyne, decided in the same Term as Hotel Employees, is not the talismanic formula it is rendered by the courts below here. As Kyne puts it:

> "Does the law, 'apart from the review provisions of the...Act,' provide a

19/In Leedom v. Int'l Union of Mine, Mill & Smelter Workers, 352 U.S. 145 (1956), a District Court injunction of an NLRB noncompliance order was held authorized because that order was not compatible with the NLRA, although no express statutory mandate or prohibition was violated.

> remedy? We think the answer surely must be yes." (358 U.S. at 188).

This formulation is significant here since it was made over a dissent which read the NLRA to limit judicial review to §10 and to leave non-ULP dispositions exclusively to the NLRB mechanism. Id. at 197-201. The center of Kyne is not whether some precise particular of the NLRA can be pointed to, but the proposition that:

> "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." (Id. at 190).

Such language cannot immunize from judicial review NLRB action so clearly violative of the purpose, history, intent and policy of the NLRA that the members of the NLRB have not attempted in the courts below to defend that action on the merits against such charged violation

The Kyne limit on District Court jurisdiction is a function of how "strong and

clear" is the incompatibility between the challenged NLRB action and the NLRA. (29). Of course that incompatibility is "strong and clear" where a specific provision is plainly violated. But comparable incompatibility exists where "gross transgression" amounting to "clear error of law" can be shown. (30). And here just such incompatibility is vigorously claimed and virtually uncontested. Only distortion of Kyne would deny reviewability in such circumstances.

Boire v. Greyhound Corp., 376 U.S. 473 (1964), was an employer challenge to an NLRB unit determination brought on the eve of an election. District Court jurisdiction was denied by the Court, which viewed the "employer" status question raised as "essentially a factual issue, unlike the question in Kyne, which depended solely upon construction of the statute." Id. at

481. The Court noted carefully that NLRB unit determinations, such as that challenged in Boire,

> "...are normally reviewably only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed, as for example, where an employer refused to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, §9(d) of the Act makes full provision for judicial review of the underlying certification order..." (Id. at 477).

In the circumstances of Boire, judicial review was not precluded or even limited, only deferred. NLRB abuse of discretion, unauthorized action, etc., could all be raised by, and would be available to Greyhound in Boire in review of the ULP order which Greyhound could cause to be issued. In Kyne, as here, review of such matters can only occur by way of the NLRB denial of representation, since, as the Court below acknowledged (20), no ULP order can be

expected. Boire does not, therefore, overrule or limit Kyne where, as here, judicial review of the NLRB denial of representation order was authorized because timely and not otherwise available.

(4)

Kyne dealt with the statutory right of professionals not to be included in a unit with non-professionals without the approval by vote of the professionals. If house staff are professional employees within the meaning of NLRA §2(12)(b), they have sustained the far greater loss of all right to NLRA coverage, not just inclusion within a unit together with non-professionals.

The mandate of §2(12)(b) involved is, moreover, particular to professional employees. For while the general definitional section indicates that covered employees "shall include any employee" (NLRA §2[2], 29 U.S.C. 152[2]), §2(12)(b) specifically

defines and covers professional employees thereby mandating with particularity coverage of all those who come within that definition. Denial of coverage to those within §2(12)(b) violates a statutory mandate no less specific than that involved in Kyne.

The response of the court below to the apparent applicability of §2(12)(b) is that it is inapplicable to those who are not first shown to be employees. (17). This response is unconvincing for purposes of evaluating the effect of Kyne here. NLRA §2(12)(b) is separate from and not part of §2(2), and thereby suggests more than just an extension of the term "employee." By describing the characteristics of a professional employee, §2(12)(b) not only defines who is a "professional," but also who is an "employee." Although the NLRB determinations are premised upon a perceived dichotomy between student and employee for

NLRA purposes, §2(12)(b) tells us that one who has completed medical school courses (i.e., "courses of specialized intellectual instruction and study" involving "knowledge of an advanced type in a field of science... customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital," NLRA §2[12][a]), and is a physician-student in the sense of being a specialist-trainee or apprentice supervised by specialists in order to qualify as a specialist (i.e., "is performing related work under the supervision of a professional person to qualify...to become a professional employee"), comes within the scope of §2(12)(b). The NLRA, therefore, mandates coverage of professionals who are engaged as trainees—the precise situation of house staff--and the student or learning aspect of training is thereby explicitly rendered non-dis-

qualifying for purposes of coverage of professionals, directly contrary to the NLRB house staff determinations.

The impact of §2(12)(b) is decisive. For that provision cannot be relegated to the non-specific and therefore non-Kyne category to which the courts below assigned the general coverage provisions of §2(2). If the NLRB house staff decisions violate the purpose of Congress to cover such personnel within the NLRA, then by reason of §2(12)(b) they violate the kind of specific mandate which warrants full judicial review and relief according to the most narrow reading of Kyne.

(5)

The Fourth,[20] Fifth[21] and Eighth[22]

20/Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961) (C.J. Haynsworth: "If the §10(f) proceeding under the National Labor Relations Act is inadequate to protect the plaintiff's right, however, the district court had jurisdiction to enforce the right" [id. at 864]).

fns. 21 & 22 next page.

Circuit Court of Appeals have indicated that District Court equity jurisdiction obtains to review arbitrary or unauthorized NLRB action short of an ULP order, as have several earlier opinions of the District of Columbia Circuit Court of Appeals.[23]

21/Surratt v. NLRB, 463 F.2d 378 (5th Cir. 1972) (NLRB failure to decertify pursuant to NLRB "blocking charge rule," held, violation of NLRA and reviewable in District Court); Templeton v. Dixie Color Printing, 444 F.2d 1064 (5th Cir. 1971) (NLRB failure to decertify union no longer representing majority, held, violation of NLRA and reviewable in District Court); see Bishop v. NLRB, 502 F.2d 1024, 1031 (5th Cir. 1974).

22/Terminal Freight Handling Co. v. Solien, 444 F.2d 699 (8th Cir. 1971), cert. den. 405 U.S. 996 (1972) (failure of NLRB to petition for injunctive relief against secondary boycott, held, reviewable by District Court and violation of NLRA).

23/Farmer v. United Electrical Workers, 110 F.Supp. 220 (D.D.C. 1953), aff'd 211 F.2d 36 (D.C. Cir. 1953), cert. den. 347 U.S. 943 (1957); Kyne, supra, 249 F.2d 490, 492 (D.C. Cir. 1957); Cox v. McCulloch, 315 F.2d 48, 50 (D.C. Cir. 1963).

See also Modern Plastics Corp. v. McCulloch, 400 F.2d 14, 16 (6th Cir. 1968) (NLRB argued "that the Leedom v. Kyne procedure is available only to unions since an

Continued

And in the related NLRB v. CIR litigation, it will be remembered, the Second Circuit Court of Appeals, with full cognizance of the circumstances which obtain here, expressly considered that there is present jurisdiction in this action to determine "the wisdom of the NLRB decision" so that any abuse by the NLRB of its discretion could be corrected here. (135). The decision below thus conflicts with applicable decisions in other Circuits as well as of this Court.

23/Cont'd. - employer can almost invariably obtain review of the Board's action by refusing to bargain with the certified representative"); Council 19, AFSCME v. NLRB, 296 F.Supp. 1100 (N.D. Ill. 1968)(NLRB refusal to exercise jurisdiction over non-proprietary nursing homes, held, reviewable and unlawful under NLRA); Note, 73 Harv.L. Rev. 84, 220 (1959)("the really significant effect of...[Kyne] is that it provides the losing union [after certification in a representation proceeding] an effective avenue of review").

II

THE NLRB DETERMINATIONS ARE UNAUTHORIZED BY AND CONTRARY TO THE NLRA, INCLUDING SPECIFIC MANDATORY AND PROSCRIPTIVE PROVISIONS OF THE NLRA, AND VIOLATIVE OF THE CONSTITUTION.

Neither the decisions below nor respondents undertake to demonstrate that the NLRB determinations reflect any NLRA provision or purpose to exclude house staff from NLRA coverage. The argument made is that respondents have no such burden and so that burden is never either assumed or carried. Not only is this view contrary to the teachings of this Court, particularly in the NLRB's health care jurisdiction (see supra 36-39), but it fails also because of the clear NLRA coverage of house staff and the mandate of this Court that the NLRB comply with and not exceed such a statutory warrant. In the latter respect we shall rely upon and not repeat the compelling demonstration in the opinions of NLRB

Chairman Fanning and Chief Judge Wright, and we discuss only such aspects of this matter not there fully covered.

(1)

The NLRB determinations are not a function of the facts in any single house staff case. All the pending original cases were heard together and decided on a common basis. (341-45). Cedars-Sinai discussed conditions supposed by the NLRB to be general to all house staff, as they are by reason of the common standards and requirements imposed upon all house staff. See Residency Directory, passim. And ultimately the NLRB made clear that its house staff decisions were functions of a "national labor policy" with which any house staff coverage, national or local, would be incompatible. The determinations therefore constitute a per se rule that house staff are to be excluded from NLRA and other

like coverage.

Customary judicial deference to the usual NLRB case-by-case fact-finding and exercise of discretion is not due the legislative function implicit in any substantive per se rule, particularly as to NLRB jurisdiction and NLRA coverage. United States v. Feaster, 410 F.2d 1354, 1362 n.8 (5th Cir. 1969), cert.den. 396 U.S. 962 (1969). This Court has frequently held that such per se rules by the NLRB are invalid unless consistent with NLRA language, history or purpose. An NLRB rule that a hiring hall clause in a union contract was per se unlawful was stricken in Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961):

> "Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." (Id. at 676). . .

In American Ship Building Co. v. NLRB, 380

U.S. 300 (1965), an NLRB per se order dealing with "lock outs" was held unauthorized:

> "[T]he Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." (Id. at 316).

In NLRB v. Insurance Agents, 361 U.S. 477 (1960), and NLRB per se determination concerning harrassing union tactics during contract negotiations was held invalid:

> "Our labor policy...[does] not... contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." (Id. at 490).24/

24/Similarly stricken have been non-NLRA authorized NLRB per se determinations that it is unlawful for an employer to bargain for a contract management clause (NLRB v. American Nat'l. Insur. Co., 343 U.S. 395 [1952]), or to lockout regular employees and utilize temporary replacements during a strike at another member of a multi-employer bargaining group (NLRB v. Brown, 380 U.S. 278 [1965]), or for a union to picket peacefully to compel recognition (NLRB v. Drivers Local Union, 362 U.S. 274 [1960]), or to discipline supervisors-members for crossing a picket line and performing rank-and-file struck work (Florida Power & Light Co. v. IBEW Local 641, 417 U.S. 790 [1974]).

And particular to this litigation are those holdings of the Court invalidating NLRB per se determinations as to NLRA-covered forms of employment, absent supporting NLRA language or purpose, both in cases where those determinations found and where they excluded from NLRA coverage.[25/] The NLRB determinations also contravene decisions of other Circuits.[26/]

25/Office Employees Int'l v. NLRB, 353 U.S. 313 (1957); Hotel Employees v. Leedom, 358 U.S. 99 (1958); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); cf. NLRB v. Yeshiva, supra.

26/See, particularly, NLRB v. Caravelle Wood Products, Inc., 466 F.2d 675 (7th Cir. 1972) (NLRB per se rule excluding from unit relatives of substantial stockholders in closed corporations as not employees within NLRA, held, invalid extension of NLRA §2 [3]), and, to like effect, NLRB v. Sexton, 203 F.2d 940 (6th Cir. 1953).

(3)

The term "employee" within the NLRA "is to be determined broadly." NLRB v. Hearst Publications, 322 U.S. 111, 129 (1944). Where, as here, "the Board is arguing for a narrowing of recognized labor rights, it has the burden of showing that such narrowing was the intent of Congress." NLRB v. IBEW, Local 388, 548 F.2d 704, 709 n.11 (7th Cir. 1977), cert. den. 434 U.S. 837 (1977). Thus it is noteworthy that the Second Circuit correctly saw it as "clear that Congress intended to include house staff within the coverage" of PL 93-360. (131).[27/] The same conclusion was reached by the most scholarly review of the

27/See also H.R.Rep. No. 95-980, 95th Cong., 2d Sess., 1-8 (1978) ("1978 House Report"); Maute, "Student-Workers or Working Students? A Fatal Question for Collective Bargaining of Hospital House Staff," 38 U. of Pitts. L.Rev. 762 (1977) ("Maute"); Comment, "Labor Problems of Interns and Residents: The aftermath of Cedars-Sinai," XI U. San Fran. L.Rev. 694 (1977).

subject to date. Maute at 767-68.

The NLRA is intended to eliminate "inequality of bargaining powers" (NLRA §1, 29 U.S.C. §151), "to redress the perceived imbalance of economic power between labor and management" (American Ship Building Co. v. NLRB, supra, 380 U.S. at 304). The NLRA must, therefore, apply where, without collective bargaining, persons are subject to the "unilateral determinations" of another as to "their wages, house, seniority, tenure, and other conditions of work" by reason of "inequality of bargaining power." NLRB v. Atkins, 331 U.S. 398, 404 (1941).

By these criteria it is clear that house staff officers need and are entitled to the coverage of the NLRA. The NLRB has said that house staff are subject to an "inequalitarian" relationship. As a condition for specialty board eligibility, house staff must provide patient care services at hospitals; supervisory person-

nel at those hospitals direct and supervise the interns and residents in providing such services; the hospitals pay house staff a fraction of the value of their services for long, arduous hours of work; and the NLRB says house staff have no right to negotiate for a fair salary or working conditions. Modern house staff thus bears an embarrasing resemblance to the old indentured apprentice. NLRA coverage is particularly appropriate here.

That house staff officers also receive training, even education, by service--as do all apprentices, particularly professionals at the beginning of their careers--does not change their status as employees.[28/] It is not disputed that house staff are deemed to be employees, not students, for purposes of voting residence, workmen's compensation, and veterans' reemployment rights.(349, 391).

28/Beecher Ancillary Services, Inc., 225 NLRB 642 (1976); UTD Corp., 165 NLRB 346 (1967); General Motors Corp., 133 NLRB 1003 (continued)

The IRS has ruled that house staff officers are employees, not students, earning taxable income; these tax rulings were confirmed in every case where patient care was involved. (201,223-25). In one house staff tax case, the 10th Circuit observed of the hospital-house staff nexus: "It is difficult to imagine a more perfect example of an employer-employee relationship."[29/] Every labor relations agency which has passed on the employee status of public hospital house staff, whether before or since Cedars-Sinai, has held the house staff covered as employees.[30/]

28/Cont'd. - (1961); Royal McBee Corp., 127 NLRB 896 (1960). See also Overnite Transportation Co. v. NLRB, 327 F.2d 36 (4th Cir. 1963); United Aircraft Corp. v. NLRB, 333 F.2d 819 (2d Cir. 1964), cert.den. 380 U.S. 910 (1965). AMA publications have referred to house staff as apprentices. 206 AMA Journal 2110-11 (1968).

29/Woddail v. Commissioner, 321 F.2d 721, 724 (10th Cir. 1963).

30/See agency rulings in Massachusetts, Nebraska, New York, Michigan and Pennsylvania collected in 1978 House Report at 4 n. 17; see also Maute at 773-74.

Reference to the NLRA, PL 93-360, and labor relations agency and other cognate rulings confirms that the NLRB determinations stand virtually alone in their perception of the status of house staff. That uniqueness is not just a function of error, but manifest incompatibility with PL 93-360. For Congress knew the prevalent perception of house staff-employee status when enacting PL 93-360. 1978 House Report at 2-4.

(4)

The NLRB determinations preempt and oust every state and local government from asserting jurisdiction over house staff so as to create a no-man's land in that area. It is not consistent with the 10th Amendment, as applied in National League of Cities v. Usery, 426 U.S. 833 (1976), for Congress to withhold its hand from house staff labor matters, including recognitional strikes (see 1978 House Report at 7-8), and simultaneously preclude any state from dealing with those vital matters (id. at 851).

Moreover, the implication of the 10th Amendment here means that the NLRB determinations must fail as not underpinned by the requisite "clear expression of an affirmative intention of Congress" to exclude house staff from NLRA coverage. NLRB v. Catholic Bishop of Chicago, supra, 440 U.S. at 504.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX I

Constitutional and Statutory Provision Involved

Constitutional and Statutory Provisions Involved.

1. Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Tenth Amendment to the United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. NLRA §2, 29 U.S.C.§152:

> "Sec. 2. When used in this Act -
>
> * * * * *
>
> (2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly,

but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which em-

ployees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

(12) The term 'professional employee' means -

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

(b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

4. NLRA §8, 29 U.S.C. §158:

"Sec. 8. (a) It shall be an unfair labor practice for an employer -

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)."

5. NLRA §9, 29 U.S.C. §159:

"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment...

(b) The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board -

(A) by an employee or

> group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a)...

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) of (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or

setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript."

6. NLRA §10, 29 U.S.C.§160:

"(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forth with transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the

Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

APPENDIX II

Opinion and Judgment of the Court of Appeals for the District of Columbia Circuit En Banc

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1209

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, *et al.*,
APPELLANTS

v.

JOHN H. FANNING, *et al.*

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 77-358)

Argued *en banc* October 9, 1979

Decided July 11, 1980

Murray A. Gordon, a member of the bar of the Supreme Court of New York, *pro hac vice* by special leave of Court, with whom *Abraham L. Zwerdling*, *Janet Kohn* and *Bernard Katz* were on the brief for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Ruth E. Peters, Attorney, National Labor Relations Board, a member of the bar of the Supreme Court of Massachusetts, *pro hac vice* by special leave of Court with whom *John S. Irving*, General Counsel, *Margery E. Lieber*, Deputy Assistant General Counsel, *Robert E. Allen*, Acting Associate General Counsel and *Elliott Moore*, Deputy Associate General Counsel, National Labor Relations Board, were on the brief for appellees.

Carl W. Vogt was on the brief for *amicus curiae*, Association of American Medical Colleges, et al. in support of petition for rehearing *en banc*.

George G. Gallantz was on the brief, for *amicus curiae*, Greater New York Hospital Association, *et al.* in support of petition for rehearing *en banc*.

Also *Carl Taylor* and *Aileen A. Armstrong*, Attorneys, National Labor Relations Board, entered appearances for appellees.

Before WRIGHT, *Chief Judge*, and MCGOWAN, TAMM, LEVENTHAL,* ROBINSON, MACKINNON, ROBB, WILKEY, WALD, and MIKVA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBB.

Dissenting opinion filed by *Chief Judge* WRIGHT with whom *Circuit Judges* ROBINSON, WALD and MIKVA join.

ROBB, *Circuit Judge*: The appellants are the house staff associations of four private, non-profit hospitals, and a national house staff organization. House staffs consist of physicians serving as interns, residents and clinical fellows, and participating in hospital-based training programs in medical specialties or sub-specialities.

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* Judge Leventhal participated in the argument in this case but died before the opinion issued.

Circuit Judge Edwards did not participate in the argument or decision of the case.

They render medical services to patients, subject to the direction and control of the hospitals. They receive salaries or stipends and other hospital compensation and benefits, and are subject to statutes providing for workmen's compensation and unemployment benefits.

The 1974 amendments to the National Labor Relations Act, Pub. L. No. 93-360, 88 Stat. 395, removed the exemption of private non-profit hospitals from the Act's definition of "employer". Thereafter at various times during 1974 and 1975 the appellants petitioned the National Labor Relations Board for certification as collective bargaining representatives of their members. They contended that members of house staffs are "employees" under section 2(3) of the Act, 29 U.S.C. § 152(3).[1] The Board dismissed each petition, upon the ground that members of house staffs are "primarily students" and therefore not employees within the meaning of the Act. *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251 (1976).[2]

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[1] Section 2(3), 29 U.S.C. § 152(3) (1976) provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

[2] *Cedars-Sinai* has been followed by the Board in a number of other decisions. St. Christopher's Hospital for Children, 223 N.L.R.B. 166 (1976); St. Clare's Hospital and Health

Dissatisfied with the Board's decision in their cases the appellants filed suit in the District Court, seeking a declaration that house staffs are employees within the meaning of the Act and an order directing the Board to accept jurisdiction over the petitions for certification. The District Court dismissed the action for lack of jurisdiction, holding that "Absent a plain violation of a mandatory provision of the National Labor Relations Act, this court may not strike down the Board's order denying plaintiffs the status of labor organization." *Physicians National House Staff Ass'n v. Murphy*, 443 F. Supp. 806, 811 (D.D.C. 1978). On appeal, a panel of this court, in reliance upon *Leedom v. Kyne*, 358 U.S. 184 (1958) reversed the judgment of the District Court. Thereafter we granted rehearing *en banc* and vacated the panel's opinion. We now affirm the judgment of the District Court.

Board orders in representation proceedings have long been held to be unreviewable unless they become the subject of unfair labor practice orders under section 10 of the Act, 29 U.S.C. § 160 (1976). Thus, an employer who believes the Board has included in a bargaining unit persons who are not employees within the meaning of the Act must await the outcome of an election, refuse

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Center, 223 N.L.R.B. 1002 (1976); University of Chicago Hospitals and Clinics, 223 N.L.R.B. 1032 (1976); Buffalo General Hospital, 224 N.L.R.B. 76 (1976); Kansas City General Hospital, 225 N.L.R.B. 108 (1976); Wayne State University, 226 N.L.R.B. 1062 (1976). The Court of Appeals for the Second Circuit has upheld the Board's position that these decisions also preempt state labor relations boards from asserting jurisdiction over house staff. NLRB v. Committee of Interns and Residents, 566 F.2d 810 (2d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The preemption issue is however not before us; and the Second Circuit court expressly recognized that the issue presented to us in this case was not presented there. 566 F.2d at 816.

to bargain with the union certified by the Board, and defend against an unfair labor practice complaint by asserting that the Board erred in determining who the employees were. *AFL v. NLRB*, 308 U.S. 401 (1940); *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *see Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943). The record compiled in the representation proceedings is considered by the Court of Appeals when it reviews the unfair labor practice order. 29 U.S.C. § 159(d) (1976). In *Leedom v. Kyne*, however, the Supreme Court held that in the limited circumstances of that case a district court had jurisdiction over a suit to set aside a Board order in a representation proceeding. The question before us is whether under the rule announced in the *Kyne* case the District Court had jurisdiction over the appellants' challenge to the Board's order.

In *Leedom v. Kyne* the Board had included both professional and non-professional employees in a unit which it found to be appropriate for collective bargaining purposes. Section 9(b)(1) of the National Labor Relations Act, 29 U.S.C. § 159(b)(1) (1976), directs that "the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit." Notwithstanding this flat statutory prohibition the Board refused to take a vote among the professional employees to determine whether a majority of them would vote for inclusion in the unit with nonprofessional employees. An election was held and a union of which Kyne was president was certified by the Board as the collective bargaining agent for the unit. Thereafter Kyne sued in the District Court, alleging that the Board had exceeded its statutory power by including the professional employees without their consent in a unit with non-professional employees, in

violation of the express command of section 9(b)(1). He prayed that the Board's action be set aside.

The Supreme Court held that in the circumstances, 28 U.S.C. § 1337 (1976)[3] gave the district court jurisdiction "to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." 358 U.S. at 188. By the language used to describe the Board's determination the Court carefully and clearly delineated the narrow scope of its holding: "made in excess of its powers", *id.* at 185; "disobeyed the express command of § 9(b)(1) . . . and in doing so . . . acted in excess of its powers", *id.* at 186-87; "an attempted exercise of power that had been specifically withheld", *id.* at 189; "agency action taken in excess of delegated powers", *id.* at 190. The Court explicitly stated that the suit was "not one to 'review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction." *Id.* at 188. Thus, in order to qualify for the *Leedom v. Kyne* exception a plaintiff must be able to identify a specific provision of the Act which, although it is "clear and mandatory", *id.* at 188, has nevertheless been violated by the Board. That the Board may have made an error of fact or law is insufficient; the Board must have acted without statutory authority.[4]

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[3] 28 U.S.C. § 1337 (1976):

> The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

[4] The jurisdiction of the district courts recognized by *Leedom v. Kyne* has been compared to the jurisdiction of a court of appeals in a mandamus proceeding. *See* L. Jaffe, Judicial Control of Administrative Action 348 (1965). *See also* Association of National Advertisers, Inc. v. FTC, No. 79-1117 (D.C.

The federal courts have consistently recognized the limits imposed by the *Kyne* decision. For example, in *Local 130, IUERMW v. McCulloch*, 120 U.S. App. D.C. 196, 345 F.2d 90 (1965), this court held that

> to say that there are possible infirmities in an action taken by the Board by reason of an erroneous or arbitrary exertion of its authority in respect of the facts before it is not to conclude that there is jurisdiction in the District Court to intervene by injunction. For such jurisdiction to exist, the Board must have stepped so plainly beyond the bounds of the Act, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court even before the Board's own processes have run their course.

Id. at 201, 345 F.2d at 95.

Similarly, the Court of Appeals for the Seventh Circuit has recently held:

> Jurisdiction is not present simply because the NLRB has made an error of law in a certification proceeding; jurisdiction is warranted only if the NLRB has violated a clear and specific statutory directive.

Chicago Truck Drivers v. NLRB, 599 F.2d 816, 819 (7th Cir. 1979). *See also McCulloch v. Libbey-Owens-Ford Glass Co.*, 131 U.S. App. D.C. 190, 191, 403 F.2d 916, 917 (1968), *cert. denied*, 393 U.S. 1016 (1969); *Machinery Employees Local 714 v. Madden*, 343 F.2d 497, 499 (7th Cir.), *cert. denied*, 383 U.S. 822 (1965); *Cihacek v. NLRB*, 464 F. Supp. 940, 944 (D. Neb. 1979);

Cir., Dec. 27, 1979), concurring opinion of Leventhal, J., at 8. In both situations, the mere possibility that the decision being reviewed is erroneous is not sufficient to support jurisdiction. The party seeking relief must show that the court or agency which made the decision had no authority to do so *See, e.g.*, In re United States, 194 U.S. App. D.C. 314, 598 F.2d 233 (1979).

WRIGHT, *Chief Judge*, with whom *Circuit Judges* ROBINSON, WALD, and MIKVA join, *dissenting*: The National Labor Relations Board (NLRB) denied appellants' petitions under the National Labor Relations Act (NLRA or Act) for certification as bargaining representatives for medical interns, residents, and fellows ("house staff").[1] The Board ruled that since house staff are primarily "students" rather than employees, they are not covered by the Act. Appellants then petitioned the District Court to declare that their members fall within the statutory definition of employees and to order the Board to assume jurisdiction of their certification petitions.[2] The District Court granted the NLRB's motion to dismiss for lack of jurisdiction because the Act provides for judicial review only of unfair labor practice (ULP)

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[1] *See Cedars-Sinai Medical Center*, 223 NLRB 251 (1976); *St. Christopher's Hospital for Children*, 223 NLRB 1032 (1976); *University of Chicago Hospitals and Clinics*, 223 NLRB 1002 (1976); *Buffalo General Hospital*, 224 NLRB 76 (1976); *Kansas City General Hospital*, 225 NLRB 108 (1976); *Wayne State University*, 226 NLRB 1062 (1976). In 1976 about two-thirds of the nation's 60,000 interns and residents belonged to the Physicians National House Staff Association, one of the appellants here. AMERICAN HOSPITAL ASSOCIATION, TAFT-HARTLEY AMENDMENTS: IMPLICATIONS FOR THE HEALTH CARE FIELD 55 (1976). The other appellants are house staff associations from Cedars-Sinai Medical Center, University of Chicago Hospitals and St. Christopher's Hospital, and the Committee of Interns and Residents.

[2] The definition of employee under the Act is discussed in Part II-A *infra*. The NLRB has successfully argued to the Second Circuit that even though the Board will not regulate house staff-hospital labor relations, the national labor policy preempts any state jurisdiction over house staff. *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The court expressly withheld judgment on the question before us today. *Id.* at 816. As a result, house staff do not currently enjoy any of the rights or bear any of the obligations imposed by the NLRA.

orders, as distinguished from refusals to certify bargaining representatives.[3] Citing *Leedom v. Kyne*, 358 U.S. 184 (1958), which identified a narrow exception to what has functioned as a prohibition of judicial review of non-ULP orders, appellants urge that Section 1337 of Title 28 confers jurisdiction over this action.[4] The court rejects appellants' *Kyne* contention and affirms the District Court. Because I think the *Kyne* exception applies to this case, I would reverse and remand for further proceedings.

I

Restrictions on court review of NLRB rulings date from enactment of the NLRA in 1935. The previous year Congress had approved Public Resolution 44 to implement the labor provisions of the National Industrial Recovery Act.[5] Congress judged Public Resolution 44 a failure, however, because it permitted judicial review of bargaining representative certification and thereby put off collective bargaining. One committee report complained that under Public Resolution 44 "any attempt by the Government to conduct an election of [bargaining] representatives may be contested *ab initio* in the courts,

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[3] *Physicians Nat'l House Staff Ass'n v. Murphy*, 443 F. Supp. 806 (D. D.C. 1978). Section 8 of the Act defines unfair labor practices by both unions and employers. 29 U.S.C. § 158 (1976).

[4] 28 U.S.C. § 1337 (1976):

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

[5] 48 STAT. 1183. Public Resolution 44 established enforcement machinery to administer § 7(a) of the National Industrial Recovery Act, 48 STAT. 195, 198, which required that NIRA industrial codes guarantee workers "the right to organize and bargain collectively through representatives of their own choosing * * *."

although such election is in reality merely a preliminary determination of fact." [6] In response to this problem the NLRA provided for court review of only unfair labor practice orders.[7] The legislative history demonstrates a clear intent to prevent appeals to the judiciary before workers can elect bargaining representatives.[8] To achieve "prompt initiation of the collective-bargaining process," Congress restricted "time-consuming" judicial review that "might defeat the objectives of the national labor policy." [9] Despite attempts during consideration of the Taft-Hartley Amendments of 1947 to expand recourse to the courts, the legislation as passed did not disturb this limitation.[10]

Consequently, the current version of the NLRA still aims to foreclose use of the courts to delay the advent

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[6] S. Rep. No. 573, 74th Cong., 1st Sess. 5 (1935). *See* H.R. Rep. No. 1147, 74th Cong., 1st Sess. 6, 23 (1935); Comment, 50 IOWA L. REV. 931, 933-934 (1965); Note, 8 BUFF. L. REV. 372, 377 (1959).

[7] Pub. L. No. 74-198, 49 STAT. 449, 455 (1935).

[8] *See American Federation of Labor v. NLRB*, 308 U.S. 401, 411 (1940) ("The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except [following unfair labor practice orders]."); *Inland Empire Council v. Millis*, 325 U.S. 697, 708 (1945); *Leedom v. Kyne*, 358 U.S. 184, 191-194 (1958) (Brennan, J., dissenting).

[9] *Leedom v. Kyne, supra* note 8, 358 U.S. at 192-193 (Brennan, J., dissenting).

[10] The House of Representatives initially approved an expansion of District Court review of NLRB certifications. *See* H.R. Rep. No. 245, 80th Cong., 1st Sess. 43, 59-60 (1947). The Senate refused to agree to that change, and it was abandoned in conference. H.R. Rep. No. 510, 80th Cong., 1st Sess. 56-57 (1947).

of collective bargaining. Section 10(f) permits direct review by the Courts of Appeals, but only after the Board issues an unfair labor practice order.[11] And the provision establishing the certification proceedings involved in this suit similarly authorizes court appeal only of an unfair labor practice order.[12]

In *American Federation of Labor v. NLRB*, 308 U.S. 401 (1940), the Supreme Court first suggested, though it did not hold, that NLRB actions short of unfair labor practice orders might nevertheless be contested in court. In that case the Court declined to rule on the Board's claim that no judicial review whatever was available for non-ULP orders. The issue, the Court said,

> involves a determination whether the Wagner Act [NLRA], in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code [the predecessor to 28 U.S.C. § 1337]. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. * * *

308 U.S. at 412. The Court applied this approach in *Inland Empire Council v. Millis*, 325 U.S. 697 (1945). After losing a representation election to another union, the Inland Empire Council challenged the Board's preelection procedures and protested the exclusion of certain employees from voting. The Board rejected the complaint, and the union sued in District Court. The Supreme Court

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[11] National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1976).

[12] *Id.* § 9(d), 29 U.S.C. § 159(d) (1976). Thus the traditional method of obtaining judicial review of a certification proceeding is through a subsequent ULP order.

National Maritime Union v. NLRB, 375 F. Supp. 421, 434 (E.D. Pa.), *aff'd without opinion*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). These cases make it clear that appellants can succeed here only by demonstrating that the Board violated some specific command of the National Labor Relations Act which mandated a determination that house staff are "employees" eligible to participate in union certification elections. We hold that appellants have not made that demonstration.

The appellants attempt to find in section 2(3) of the Act, 29 U.S.C. § 152(3) (1976),[5] the clear statutory mandate required by *Leedom v. Kyne*. We think the attempt fails. That section does not define the term employee nor does any other section of the Act. Whether a particular individual is an employee depends upon the facts. The task of decision on the facts of each case is assigned to the National Labor Relations Board and in making that decision the Board exercises its informed discretion. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398 (1947); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977). As the Supreme Court said in *NLRB v. Hearst Publications, Inc.*, *supra* at 130:

> It is not necessary in this case to make a completely definitive limitation around the term "employee". That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the work-

[5] *See* note 1 *supra*.

> ers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board. *Gray v. Powell*, 314 U.S. 402, 411.

[footnote omitted]

In this case the Board carefully analyzed the facts and reached the conclusion that interns, residents, and clinical fellows are primarily engaged in graduate educational training and that their status is therefore that of students rather than of employees; that the programs in which they participate were "designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice." *Cedars-Sinai Medical Center*, 223 N.L.R.B. 251, 253 (1976). In making this determination the Board acted within its jurisdiction. Its conclusion could not be reviewed by the District Court.

Appellants contend that because house staff are not specifically excluded from the protections of the Act by section 2(3), 29 U.S.C. § 152(3) (1976), the Board's finding that they "possess certain employee characteristics", 223 N.L.R.B. at 251, required the Board to classify them as employees. This argument cannot stand in light of *NLRB v. Bell Aerospace Corp.*, 416 U.S. 267 (1974), which held that managerial employees are not covered by the Act although they are not specifically excluded from the reach of section 2(3). This decision means that for policy reasons persons who are literally "employees"

may nonetheless be excluded from coverage under the Act. *See also Allied Chemical Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 168 (1971). It is difficult to see, therefore, how section 2(3) can be read as a mandate requiring the Board to consider all persons who "possess certain employee characteristics" as employees covered by the Act.

The Act's definition of "professional employees" does not help the appellants as they suggest. Section 2(12) of the Act, 29 U.S.C. § 152(12) (1976) states:

> The term "professional employee" means—
>
> (a) any employee engaged in work . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital . . . or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

Because this definition is applicable to "any employee", it is not a command to the Board to regard anyone as an employee. Rather, it classifies those persons who are already employees. House staff can not be "professional employees" unless they are first found to be "employees".

Appellants argue alternatively that the necessary specific mandate to the Board may be discerned in the legislative history of the 1974 amendments. We disagree. A careful examination of both the language and legislative history of the amendments reveals that Congress was not directing the Board to classify house staff as employees.

The amendments included private non-profit hospitals within the definition of "employer", but they made no attempt to define "employee" nor did they require any change in the Board's procedures for determining who is an employee. The conclusion is inescapable that Congress intended the Board to determine the employee status of hospital workers in its usual manner—by analyzing the facts of each case. This conclusion is supported by the discussion of the Act's definition of "supervisor" in the reports of the congressional committees which considered the legislation. Discussing the application of that definition to health care professionals, both committees said they expected the Board to evaluate the facts of each case in its usual manner in deciding whether particular employees were supervisors. *See* H.R. REP. No. 93-1051 at 7 (1974); S. REP. No. 93-766 at 6 (1974).

It is reasonable to conclude that committees which expected the Board to follow its usual procedures in determining whether employees are supervisors also expected the Board to follow its usual procedures in determining whether persons are employees. At the very least, one would expect that if Congress were enacting a change in the Board's operations, the committees would have said so. Yet nothing in the committee reports gives any indication that Congress was ordering a departure from the usual procedure by directing the Board to find that house staff are employees.[6]

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[6] The Committees' discussion of the supervisor issue does refer to "health care professionals such as registered nurses, interns, residents, fellows and salaried physicians." House Report at 7; Senate Report at 6. This reference is similar to the statements of senators discussed in the text. The discussion may indicate a belief that the Board's analysis of the facts would lead it to conclude that house staff are employees, but it does not constitute a directive to the Board to arrive at such a conclusion.

Finally, appellants refer us to remarks by Senator Cranston, one of the floor managers of the 1974 amendments, who specifically referred to the problems of house staff in urging that the bill be enacted. 120 CONG. REC. 12937 (1974). These remarks, as well as passing references to house staff made by Senator Dominick, an opponent of the measure (*Id.* at 12971, 22580), indicate at most that these senators believed that the Board's evaluation of the facts would lead it to the conclusion that house staff are employees. They stop short of showing, however, that these senators thought the bill required that house staff be considered employees.

Given the absence of specific language mandating the result sought by appellants, it would require far more forceful indications in the legislative history to convince us that Congress, by telling the Board that members of a particular group must be treated as employees, mandated a significant change in Board procedures. In fact, the strongest evidence of congressional intent available to us supports the Board's position in this case. After we heard oral argument *en banc*, a bill designed to overrule the Board's house staff decisions by explicitly including house staff within the definition of employees (H.R. 2222) was defeated in the House of Representatives.[7] Opponents of the bill stated their agreement with the NLRB's position that collective bargaining was inappropriate for house staff because their relationship with their hospitals was primarily an educational one. H.R. REP. No. 96-504 at 10-18 (1979) (minority views); 125 CONG. REC. (daily ed., Nov. 28, 1979) at H 11300 (Rep. Erlenborn); *Id.* at H 11302 (Rep. Erdahl); *Id.* (Rep. Derwinski); *Id.* at H 11303 (Rep. Goldwater). The defeat of this bill casts substantial doubt upon appellants'

[7] Similar bills were introduced in the 94th Congress (H.R. 15842) and the 95th Congress (H.R. 2222) but were never brought to a vote.

contention that Congress by the 1974 amendments intended to direct the Board to regard house staff as employees.

Appellants emphasize that the Board's decisions in the house staff cases will never be subject to judicial review if the District Court is affirmed. We agree that it may be unlikely that the correctness of these decisions will be tested in an unfair labor practice proceeding reviewable in a court of appeals, but we think this is not a reason to permit District Court review. Congress has considered the likelihood that some Board decisions in representation proceedings may evade all judicial review. Nevertheless, it has rejected attempts to provide review in such cases.

When it passed the Taft-Hartley Act, Congress considered an amendment which would have allowed immediate review of Board certification decisions. This proposal was included in the House version of the bill, *see* H.R. REP. No. 245, 80th Cong., 1st Sess. 43 (1947). Among the arguments made in its favor was one quite similar to the one made by appellants here. The absence of immediate judicial review was described as "unfair to . . . the union that loses, which has no appeal at all no matter how wrong the certification may be [and to] the employees, who also have no appeal." *Id.* The provision was eliminated in conference. *See* H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 56-57 (1947). Senator Taft explained this action by commenting that the proposal "would permit dilatory tactics in representation proceedings". 93 CONG. REC. 6444 (1947). *See also Leedom v. Kyne*, 358 U.S. at 184, 197 (1958) (Brennan, J. *dissenting*); *Cf. Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943).

Thus, Congress was aware that Board decisions such as the ones in this case might never be reviewed by a court and that this might cause hardship to a union.

Nevertheless, Congress has not provided for judicial review. Appellants' argument based on the unavailability of review must therefore be rejected.

Courts have agreed that "it is not the unavailability of a remedy which triggers the *Kyne* exception, but the violation of a clear statutory demand." *Cihacek v. NLRB*, 464 F. Supp. 940, 944 (D. Neb. 1979). In *Local 1545, United Bhd. of Carpenters v. Vincent*, 286 F.2d 127, 132 (2d Cir. 1960), the court said *Leedom v. Kyne* does not "recognize jurisdiction of the District Court to enjoin representation orders whenever there is a colorable allegation that the Board has misread the declared will of Congress and the remedy afforded by § 9(d) is likely to prove inadequate." And, in *National Maritime Union v. NLRB*, 375 F. Supp. 421, 439 (E.D. Pa.), *aff'd without opinion*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), the court concluded:

> It may well be that the occasional injustice which results from this statutory scheme is too high a price to pay for expediting the vast majority of representation elections. It may also be that the Act should permit judicial review when unions are not certified under § 9(c). But as Mr. Justice (later Chief Justice) Stone concluded more than thirty years ago, "these are arguments to be addressed to Congress and not the courts." (quoting *AFL v. NLRB*, 308 U.S. 401, 411-12 (1940)).

The legislative history and case law provide the answer to appellants' suggestions that affirmance of the District Court will mean that without being subject to judicial review the Board may decide that workers such as plumbers or carpenters are not "employees". It is clear that the extent to which the Board's decisions may be reviewed by the federal courts is within the control of Congress. That Congress has not expanded the scope of judicial review of the Board's certification decisions

indicates that it is satisfied with the way the Board has been functioning.[8] A series of arbitrary or irrational decisions by the Board might prompt Congress to insist upon a greater degree of judicial scrutiny. Unless Congress does so, however, the district courts are powerless to adjudicate the merits of certification decisions absent a clear violation of the National Labor Relations Act by the Board.

The 1974 amendments gave the Board jurisdiction over private, non-profit hospitals. The National Labor Relations Act however does not expressly command the Board to find that members of house staffs are employees. In the exercise of its jurisdiction the Board has determined that they are not employees. That decision is not reviewable in the District Court. The cause of action recognized by *Leedom v. Kyne* "is not one to 'review' . . . a decision of the Board made within its jurisdiction." 358 U.S. at 188. The District Court correctly dismissed the complaint for lack of jurisdiction.

The judgment of the District Court is

Affirmed.

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[8] The recent defeat of H.R. 2222 indicates that Congress is satisfied with the very decisions challenged by appellants in this case.

found that the losing union had failed to show that the Board had "depart[ed] from statutory requirements or from those of due process of law," *id.* at 700, so the courts lacked jurisdiction of the claim.

The Supreme Court did not return to this issue until *Leedom v. Kyne*, *supra*, in 1958.[13] In *Kyne* the Board had certified as a bargaining unit a group of 233 professional employees and nine nonprofessional workers at the Westinghouse Electric Plant in Cheektowaga, New York. 358 U.S. at 185-186. The Board's order was in apparent violation of Section 9(b)(1) of the NLRA, 29 U.S.C. § 159(b)(1) (1976), which commands that bargaining units shall not include both professional and nonprofessional employees without prior approval of the professional workers. The Board did not deny its violation of Section 9(b)(1), but argued simply that the District Court lacked jurisdiction of the suit under the Act. The Supreme Court, however, held that the Board's action could be challenged:

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9(b)(1) is clear and mandatory. * * * [The Board] deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.

358 U.S. at 188-189.

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[13] The Second Circuit recognized District Court jurisdiction of *constitutional* challenges to non-ULP orders in 1949. *Fay v. Douds*, 172 F.2d 720, 723 (2d Cir. 1949); *see Fitzgerald v. Douds*, 167 F.2d 715 (2d Cir. 1948).

The *Kyne* Court's concentration on the "rights" of the employees under the NLRA highlights the issues presented by the case before us. The Court pointed out that if jurisdiction were lacking, there would be " 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control * * *, to protect and enforce that right." *Id.* at 190, *quoting Switchmen's Union of North America v. NMB*, 320 U.S. 297, 300 (1943). The opinion concluded, "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190.

The exception to nonreviewability of non-ULP orders has been applied infrequently.[14] In 1963 the Supreme Court found District Court jurisdiction in a case implicating foreign affairs matters,[15] but the Court did not apply *Kyne* in its only other decision on this issue, *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). That decision concerned the NLRB's ruling that Greyhound was a joint employer of maintenance crews that were directly employed by another firm under contract to Greyhound. Pointing to the "painstakingly delineated procedural boundaries of *Kyne*," the *Boire* Court held that Greyhound's identity as a joint employer was "essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute." *Id.* at 481. Because "[t]he *Kyne* exception is a narrow one," the Court refused to extend it "to permit plenary district

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[14] *See* cases cited in note 17 *infra*.

[15] *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power").

court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." *Id.*

II

This circuit, like the other lower courts, has been frugal in recognizing the *Kyne* exception. We have ruled repeatedly that "the showing that the Board has violated the Act * * * must be strong and clear" [16] before the equity powers of the District Courts may be invoked under Section 1337.[17] We have insisted that the alleged statutory duty of the Board in such suits must be "clear and mandatory," since "[e]quitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion * * *." [18]

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[16] *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

[17] *See Nat'l Ass'n of Women's & Children's Apparel Salesmen v. NLRB*, 465 F.2d 662 (D.C. Cir. 1972); *Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968); *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704 (D.C. Cir. 1965); *Local 130, IUERMW v. McCulloch*, 345 F.2d 90 (D.C. Cir. 1965); *Kingsport Press, Inc. v. McCulloch*, 336 F.2d 753 (D.C. Cir.), *cert. denied*, 379 U.S. 931 (1964); *Milk & Ice Cream Drivers Union, Local 98 v. McCulloch*, 306 F.2d 763 (D.C. Cir. 1962); *Atlas Life Ins. Co. v. Leedom*, 284 F.2d 231 (D.C. Cir. 1960); *Leedom v. Internat'l Brhd of Electrical Wkrs*, 278 F.2d 237 (D.C. Cir. 1960); *Internat'l Ass'n of Tool Craftsmen v. Leedom*, 276 F.2d 514 (D.C. Cir.), *cert. denied*, 364 U.S. 815 (1960); *Leedom v. Norwich, Conn. Printing Specialties & Paper Products Union, Local 494*, 275 F.2d 628 (D.C. Cir.), *cert. denied*, 362 U.S. 969 (1960); *Nat'l Biscuit Division v. Leedom*, 265 F.2d 101 (D.C. Cir.), *cert. denied*, 359 U.S. 1011 (1959).

[18] *Leedom v. Kyne*, 249 F.2d 490, 491 (D.C. Cir.), *aff'd*, 358 U.S. 184 (1958).

To preserve the Wagner Act's judgment that judicial review of non-ULP orders can obstruct collective bargaining, the equitable purpose of the *Kyne* exception must be balanced against the need to limit recourse to the judiciary.[19] I agree with Professor Jaffe that the basis for court "intervention" in such cases must be "the type of gross transgression for which we invoke the label 'jurisdictional' or 'clear errors of law' * * *."[20] The factors relevant to this determination are (A) whether the alleged error by the Board involved a question of statutory interpretation or merely an issue of fact; (B) whether the statutory provision is "clear and mandatory" in creating rights for those subject to the NLRA; (C) whether the party challenging the Board's action has a realistic hope of eventual court review following an unfair labor practice order; and (D) the potential for thwarting the purposes of the NLRA which would flow from finding jurisdiction in this case.[21]

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[19] Professor Cox concluded shortly after *Kyne* that the decision "places all NLRB certifications in the category of reviewable orders." Cox, *The Major Labor Decisions of the Supreme Court October Term 1958*, ABA Section of Labor Relations Law, 1959 Proceedings, *reprinted in* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 441, 443 (4th ed. 1960). In rejecting this view courts have focused on (1) the clarity of the alleged violation of the statute, *Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks, supra* note 17, 402 F.2d at 205; and (2) available avenues to challenge the Board decision, *Cox v. McCulloch*, 315 F.2d 48, 50 (D.C. Cir. 1963). *See* Note, *supra* note 6, 8 BUFF. L. REV. at 383 ("inadequacy of review" plus "factor of illegality").

[20] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 348 (1965).

[21] The jurisdictional inquiry involves some examination of the merits of appellants' argument. *See Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks, supra* note 17, 402 F.2d at 199, 205. This is necessary if we

If the District Court was correct that "[t]he question of the status of house staff members as employees or as students is primarily a factual and definitional determination of the type traditionally left to the discretion of the Board," [22] I would agree with the majority that there is no jurisdiction in the courts to hear this case. Appellants insist, however, that the legislative histories of the NLRA and the 1974 Health Care Amendments to that statute [23] affirmatively demonstrate a congressional intent to cover house staff under the Act. To decide this question it is necessary to examine the definition of "employee" under the Act and the effect of the 1974 Amendments.[24]

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are to preserve the policy of holding the courthouse door not "wholly closed," yet also not "widely ajar." *Local 130, IUERMW v. McCulloch, supra* note 17, 345 F.2d at 97.

[22] *Physicians Nat'l House Staff Ass'n v. Murphy, supra* note 3, 443 F.Supp. at 810. There is no dispute here as to what constitutes house staff. The only issue is whether they are employees under the Act.

[23] Pub. L. No. 93-360, 88 STAT. 395 (1974).

[24] *See Internat'l Brhd of Electrical Wkrs v. NLRB*, 487 F.2d 1143, 1170-1171 (D.C. Cir. 1973) (*en banc*), *aff'd sub nom. Florida Power & Light Co. v. Internat'l Brhd of Electrical Wkrs, Local 641*, 417 U.S. 790 (1974):

> In the final analysis, "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by the courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself * * *." * * *

[Continued]

Section 2(3) of the NLRA, 29 U.S.C. § 152(3) (1976), provides: "The term 'employee' shall include any employee * * * unless this subchapter explicitly states otherwise * * *." The Supreme Court has held that "the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' * * * leaves no doubt that its applicability is to be determined broadly * * *."[25] The breadth of the definition has been retained through the express statutory exclusion of only a few groups of workers—agricultural workers, domestic laborers, family workers, independent contractors, and supervisory employees.[26]

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[24] [Continued]

Quoting SEC v. Chenery Corp., 332 U.S. 194, 215 (1947) (Jackson, J., dissenting). *See also SEC v. Sloan*, 436 U.S. 103, 118 (1978):

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts * * *. * * * But the courts are the final authorities on issues of statutory construction, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' NLRB v. Brown, 380 U.S. 278, 291." * * *

Quoting Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968).

[25] *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944) (footnote omitted).

[26] Section 2(3), 29 U.S.C. § 152(3) (1976), excludes

> any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or * * * employed by his parent or spouse, or * * * having the status of an independent contractor, or * * * employed as a supervisor, or * * * by an employer subject to the Railway Labor Act * * *.

Notably, house staff are not excluded from the Act in terms.[27] Quite the reverse is true.

The Taft-Hartley Amendments distinguished between professional and nonprofessional employees for determination of appropriate bargaining units.[28] This distinction applies only after the Board has determined that workers fall within the definition of employee in Section 2(3). Nevertheless, it is plain that the definition of professional employee reflects the legislative understanding as to which workers fall within the broader definition of employee. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 297-298 (1974) (White, J., dissenting). The relevant passage provides:

> (12) The term "professional employee" means—
>
> (a) any employee engaged in work * * * (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital * * *; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

29 U.S.C. § 152(12) (1976). The House Conference Report on the Taft-Hartley Act described this definition as

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[27] Indeed, there was no exclusion for nonprofit hospitals in the NLRA until 1947, *see* note 31 *infra*, so there is no evidence in the Wagner Act of concern over the appropriateness of public regulation of labor relations in hospitals.

[28] 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 at 1663-1664 (1948) (hereinafter cited as LEGISLATIVE HISTORY).

applying to "such persons as legal, engineering, scientific and *medical personnel together with their junior professional assistants.*" [29] As NLRB Member (now Chairman) Fanning urged in dissent to one of the Board's house staff decisions, "[T]he definition fits, *precisely*, housestaff officers." [30]

In response to a spate of recognition strikes in the hospital industry, Congress extended NLRB jurisdiction to nonprofit health care facilities in the 1974 Health Care Amendments.[31] The legislative history of these amendments provides substantial support for the view that Congress intended that house staff be covered by the NLRA. In Senate hearings spokesmen for appellants, while urging passage of the amendments, argued for a new provision specifying that house staff are not "supervisory employees" excluded from the coverage of the Act under Section 2(11).[32] The committee reports on the legislation explain why that suggestion was not adopted:

> Various organizations representing health care professionals have urged [exclusion of] such professionals from the definition of "supervisor". The Committee has studied this definition with particular reference to health care professionals, such as

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[29] H.R. Rep. No. 510, *supra* note 10, at 36 (emphasis added).

[30] *Cedars-Sinai Medical Center*, *supra* note 1, 223 NLRB at 258 (Member Fanning, dissenting) (emphasis in original).

[31] S. Rep. No. 766, 93d Cong., 2d Sess. 3 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 4, 5 (1974). Under a provision offered from the floor of the Senate the Taft-Hartley Amendments had exempted nonprofit hospitals from the NLRA. H.R. Rep. No. 510, *supra* note 10, at 31-32; 2 LEGISLATIVE HISTORY, *supra* note 28, at 1662.

[32] *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 291-423 (Aug. 1, 1973).

> * * * interns, residents, fellows, * * * and concludes that the proposed amendment is unnecessary * * *. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees * * *, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer. [33]

The clear assumption underlying this discussion of the supervisory status of house staff is that they are otherwise within the definition of employee in the Act. Had Congress not considered them employees, their status as supervisors could not have been at issue since the term "supervisor" as used in the Act refers to a subcategory of "employees." [34] This view is buttressed by comments on the floor of the Senate. In introducing the legislation Senator Cranston, co-manager of the bill, explained that the amendments would grant collective bargaining rights

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[33] S. Rep. No. 766, *supra* note 31, at 6; *see* H.R. Rep. No. 1051, *supra* note 31, at 7.

[34] Neither the majority nor the Board is able to offer any explanation of how the committee reports could logically have addressed the question whether house staff are supervisory employees without assuming that they are employees under the Act. Instead the majority suggests that insofar as the committees expected the Board to follow its usual procedures in deciding whether house staff are supervisors, it may be assumed that the committees also expected the Board to follow its usual procedure in deciding whether house staff are employees. It should be noted, however, that the Board itself has not interpreted the committee statements about the supervisory status of house staff in the manner that the majority suggests. In its decision in *Kansas City General Hospital, supra* note 1, 225 NLRB at 109, the Board stated that "Congress, in passing the * * * amendments, * * * made a determination that [house staff] were not supervisors within the meaning of the Act[.]"

to "notoriously underpaid" hospital workers, including "doctors." [35] He added:

> According to [the] president of the Physicians National Housestaff Association, the average house staff officer—intern, resident, or fellow—works 70 to 100 hours per week, and earns about $10,000 per year. His hourly wage, then, ranges from $1.92 to $2.74. [36]

Senator Cranston would certainly not have cited interns in this statement unless he understood them to be covered by the legislation he was offering.

Even one of the opponents of the 1974 Health Care Amendments, Senator Dominick, referred repeatedly to the coverage of house staff under the bill, grouping house staff together with other hospital employees.[37] When the amendments came up for a final vote, he stated, "I know that nurses, staff physicians, and others are in favor of the principle of collective bargaining," [38] and added:

> I am sure as dedicated professional nurses, staff physicians, and other hospital employees * * * would never jeopardize their patients['] well being [*sic*]. The balancing of these groups' rights as employees to form bargaining units with the public interest in access to health care has given us some special features in this bill * * *. * * * [39]

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[35] 120 CONG. REC. 12937 (1974). As graduates of medical colleges and licensed physicians, house staff are, of course, doctors.

[36] *Id.*

[37] For example, Senator Dominick noted assurances he had received that if the nonprofit hospital exemption were removed "house staff physicians * * * would never go on strike." *Id.* at 12971.

[38] *Id.* at 22580.

[39] *Id.*

In light of these congressional statements, I am compelled to agree with the Second Circuit's statement that Congress "considered housestaffs within the scope of the Health Care Amendments."[40] As employees under the NLRA, house staff may not be deprived of rights "assured to them by Congress." *Leedom v. Kyne, supra*, 358 U.S. at 189. I reach this conclusion not on the basis of factual characteristics of the hospital industry or the work performed by house staff, but on the terms of the statute itself and its legislative history.[41]

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[40] *NLRB v. Committee of Interns & Residents, supra* note 2, 566 F.2d at 815.

[41] My consideration of the legislative history on this question is similar to the approach taken by both the majority and the dissenters for the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Chief Justice Burger's opinion for the majority concluded after "close examination" of the legislative history of the NLRA that Congress did not extend the protections of the Act to church-operated schools, 440 U.S. at 504-507, while Justice Brennan in dissent disputed the majority's view of the jurisdiction conferred by the statute. Because the Act does not use plain statutory language extending the Board's coverage to specific groups, both the Burger and Brennan opinions resort to the legislative history and refer to exactly the same legislative materials that I canvass today. Moreover, I believe that the specific congressional statements on house staff—including the statutory definition of professional employee, the accompanying committee explanation in 1947, and the committee statement and floor statements in 1974—easily satisfy the Chief Justice's requirement of "a clear expression of affirmative intention." *Catholic Bishop, supra*, 440 U.S. at 504. In contrast, the dissent in *Catholic Bishop* cites only one statement by a prominent senator, *id.* at 515, and more general statements as to the breadth of NLRB jurisdiction over nonprofit institutions, *id.* at 515 & n.7. I certainly do not disparage the judgment of the four dissenting Justices that that legislative history was sufficient to establish Board jurisdiction over parochial school teachers, but I emphasize the greater support for my conclusion in the instant case.

Although I conclude that the Board misconstrued a provision of the NLRA, the *Kyne* exception requires violation of a "clear and mandatory" statutory requirement creating rights under the Act.[42] This criterion has not been interpreted woodenly, however. The Act clearly directs that employees receive the protections it provides. In *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*, 322 F.2d 993 (D.C. Cir. 1963), this court held that the *Kyne* exception applies to positive commands of the NLRA as well as to negative prohibitions as in *Kyne*.[43] *Miami Pressmen* also found that the statutory provision involved in that case, though "not mandatory in all instances," did impose a mandatory duty "[o]n these facts."[44]

My earlier discussion establishes the clarity of the congressional intent on this matter.[45] Satisfaction of the statutory definition involved here triggers specific Board

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[42] *See Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks, supra* note 17, 402 F.2d at 205 ("the assertion of jurisdiction [is confined] to cases where the error on the merits is as obvious on the face of the papers as the violation of specific statuotry language"); *Lawrence Typographical Union v. McCulloch, supra* note 17, 349 F.2d at 706 n.3 ("A mere allegation in the complaint that the Board has violated the Act does not confer jurisdiction. The violation must be proved.").

[43] *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*, 322 F.2d 993, 997 (D.C. Cir. 1963). *See Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, 703 (5th Cir. 1971), *cert. denied*, 405 U.S. 996 (1972); *Nat'l Maritime Union of America v. NLRB*, 375 F.Supp. 421, 429 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[44] *Miami Pressmen, supra* note 43, 322 F.2d at 997, 998.

[45] *See* Part II-A *supra*.

action, after an appropriate petition for certification, to hold representation elections as required by Section 9(c)(1) of the Act, 29 U.S.C. § 159(c)(1) (1976).[46] By denying that house staff are employees under the Act the Board contravened the legislative direction that house staff and hospitals have access to Board-administered collective bargaining. Section 7 of the Act, 29 U.S.C. § 157 (1976),[47] provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

The "Findings and declaration of policy" in the NLRA echo this guarantee of employee rights,[48] and both the Board and the courts have the responsibility to enforce these rights.[49] In its decisions excluding house staff from

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[46] The provision states that if, upon petition by "an employee or group of employees," the Board finds that "a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

[47] *See also Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-544 (1972); *NLRB v. Textile Wkrs Union of America, Local 1029*, 409 U.S. 213, 216 (1972).

[48] 29 U.S.C. § 151 (1976):

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[49] *See Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970).

its coverage the Board failed to satisfy this most fundamental mandate of the NLRA.

The only possible exception to the Board's duty in this case would be under Section 14(c) of the Act, which permits the Board to decline jurisdiction over employers having an insubstantial effect on commerce.[50] But the 1974 Health Care Amendments expressly extend NLRA coverage to the nonprofit hospitals that employ house staff, so no such issue is present in this case.

The majority does not really deny that under Section 2(3) house staff are employees covered by the Act. It simply argues that because neither Section 2(3) nor the legislative history of the Health Care Amendments specifically—in terms—says so, they are not entitled to the *Kyne* protection afforded other employees and thus are stripped of any protection under the Act.[51] In my view, neither Section 2(3) nor the legislative history of the Health Care Amendments supports any such bizarre interpretation.

Certainly a finding by this court that the Board violated a specific statutory mandate in this case must ultimately rest on a determination that house staff are employees within the meaning of the Act. But that determination need not be based on specific language in the statute or in legislative history so stating. The reason

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[50] 29 U.S.C. § 164(c)(1) (1976):

> The Board, in its discretion, may, by rule of decision or by published rules * * *, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction[.]

See Hotel Employees Local No. 255 v. Leedom, 358 U.S. 99 (1958); *Office Employes Internat'l Union, Local No. 11 v. NLRB*, 353 U.S. 313 (1957).

[51] *See* text and notes at notes 61, 64-67 *infra*.

for examining the legislative histories of both the Taft-Hartley Act and the Health Care Amendments is to determine whether appellants are correct in claiming they show that Congress intended house staff to be employees under the Act. If they are right, and I believe I have shown that they are, the Board may not ignore that intent simply because it is not explicit in the statutory language or its history. A statute can have only one accepted interpretation—derived from its language or its legislative history or both—and that interpretation is the one the Congress intended at the time the legislation was enacted.

Thus, in the particular circumstances of this case, Section 2(3), read in the light of the legislative intent to make house staff employees under the Act, provides the requisite "clear statutory mandate" that brings this case within the ambit of the *Kyne* doctrine.[52] That Congress did not specifically direct the Board to find house staff to be employees under the Act is not dispositive. In this regard the Supreme Court's decision in *NLRB v. Bell Aerospace Co., supra*, a case on which the majority relies, is instructive. The Court in that case addressed the question whether the Board had correctly determined that certain managerial employees were "employees" under the Act. After carefully canvassing the legislative history of the Taft-Hartley Amendments, the Court concluded that Congress had intended that such employees be excluded from coverage under the Act. 416 U.S. at 275, 283-284.[53] The Court reached this conclusion even

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[52] It should be pointed out that the reason why the committee reports did not specifically direct the Board to find house staff to be employees was that at no time during the hearings and debates on the amendments was there any suggestion that house staff might not be entitled to coverage under the Act. *See* —— F.2d at —— (slip op. at 23-24) *infra*.

[53] The Court also noted that prior decisions by the Board and the Courts of Appeals all pointed to the conclusion that managerial employees are not covered by the Act.

though the statute does not specifically exclude managerial employees from its coverage, and despite the fact that nothing in the legislative history specifically directed the Board to exclude such employees. My examination of the legislative history of the Health Care Amendments to determine whether Congress understood house staff to be employees directly parallels the Supreme Court's approach in *Bell Aerospace*.[54]

The majority interprets *Bell Aerospace* as having held that "for policy reasons persons who are literally 'employees' may nonetheless be excluded from coverage under the Act." Majority opinion, —— F.2d at —— (slip opinion at 9-10). Presumably this "policy" decision is to be made by the Board. But as I read *Bell Aerospace* the Supreme Court's decision that managerial employees are not covered by the Act did not rest on "policy reasons." Rather, the decision was based on what the Court, after a careful examination of the legislative history, determined the intent of Congress on this question to be. Thus, to find support for its decision in this case in *Bell Aerospace*, the majority must show that Congress intended to exclude house staff from coverage under the Act.[55] This, I submit, it has not done.

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[54] *See also* discussion of *NLRB v. Catholic Bishop of Chicago* in note 41 *supra*.

[55] The majority also cites *Allied Chemical & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), as standing for the proposition that "policy reasons" may justify exclusion of persons who are "literally employees" from the Act's coverage. However, in that case the Supreme Court simply held that retirees are not employees under the Act, pointing out that "the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire." 404 U.S. at 166. Thus *Allied Chemical Workers* cannot be reconciled with the majority's suggestion here that the Board may decide that persons who are literally

The majority describes the recent failure of the House of Representatives to adopt a bill that would have overruled the Board's house staff decisions by explicitly including house staff within the statutory definition of employees as "the strongest evidence of congressional intent available to us * * *."[56] However, in assessing the relevance of this development to the case at bar it should be pointed out that the action of one house of Congress cannot be a basis from which to draw inferences about the intentions of the whole Congress. Moreover, insofar as the issue involved in this case is the congressional intent expressed in the legislative history of the Health Care Amendments, it must be remembered that our concern is with the intent and views of the 93rd Congress—the Congress that enacted these amendments.

The Supreme Court has consistently admonished against reading the mindset of one Congress from the actions of a subsequent Congress. In *United States v. United Mine Workers*, 330 U.S. 258 (1947), the Court rejected the notion that opinions expressed by legislators many years after an Act was passed could be given any real weight. "We fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932 * * *." *Id.* at 282. It is well established that " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' * * * [T]he abortive action of the subsequent Congress 'would not supplant the contemporaneous intent of the Congress which enacted the . . . Act.' " *Waterman S.S. Corp. v. United States*, 381 U.S. 252,

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"employees" are nevertheless not employees for purposes of the Act, particularly in view of the Act's rather explicit directive that "[t]he term 'employee' shall include *any employee* * * * *unless this subchapter explicitly states otherwise* * * *." 29 U.S.C. § 152(3) (1976) (emphasis added).

[56] *See* majority op., —— F.2d at —— (slip op at 12).

269 (1965), *quoting United States v. Price*, 361 U.S. 304, 313 (1960), and *Fogarty v. United States*, 340 U.S. 8, 14 (1950). Most recently, the same stricture was laid down by Chief Justice Burger, saying, "Legislative observations 10 years after passage of the Act are in no sense part of the legislative history." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977). *See also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-349 (1963); *United States v. Wise*, 370 U.S. 405, 411 (1962).

The pertinence of subsequent congressional action is even further diminished when, as is the case here, the "action" being cited is *inaction*. *United States v. United Mine Workers*, *supra*. In *United States v. Price*, *supra*, the taxpayer sought to have the Court reason from the refusal of a congressional committee to take action repudiating a judicial decision on which he relied. The Court refused, declaring that "[s]uch nonaction by Congress affords the most dubious foundation for drawing positive inferences." 361 U.S. at 310-311. The majority seems to be suggesting that the inaction of one house of Congress is persuasive evidence of what a previous Congress meant to do when it acted in its full constitutional cycle. I am not persuaded.

It should also be noted that it is far from clear that the failure of the House to adopt the bill must be construed as an endorsement of the Board's house staff decisions. Although it is true, as the majority notes,[57] that some opponents of the bill stated their agreement with the Board's conclusion that house staff are not employees, it is also quite possible that other votes against the bill were based on different considerations. For example, some of the negative votes may simply reflect a reluctance on the part of some members of the House to abandon

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[57] *Id.*, —— F.2d at —— (slip op. at 12).

the Act's wise policy of requiring that "[t]he term 'employee' shall include any employee * * * unless this subchapter explicitly states otherwise," [58] in favor of listing all the groups of employees to be covered by the Act.

As previously noted, the majority's rejection of appellants' *Kyne* contention also rests on the fact that the committee reports accompanying the Health Care Amendments and the statements by Senators Cranston and Dominick do not explicitly state that Congress was directing the Board to find house staff to be employees under the Act. What the majority omits to mention, however, is that at no time during Congress' consideration of the amendments was there any doubt that they applied to house staff or that house staff were employees under the Act. Both House and Senate committees held hearings on the legislation. Not one of the witnesses—which included representatives of the Department of Labor and the Association of American Medical Colleges, *amicus curiae* in the instant case—who testified at these hearings even suggested that house staff were not brought under the coverage of the Act by the proposed amendments because they are "primarily students" or for any other reason. Quite the contrary, the assumption was that the legislation would apply to house staff. Nor was there any reference to any student status of house staff during the floor debates on the amendments. Finally, there can be no suggestion that the reason why this issue was not raised was because the Congress and the parties concerned with the legislation were unaware of it. State labor relations boards in New York and Michigan had squarely ruled that house staff were employees under the labor relations acts of those states.[59] And representa-

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[58] 29 U.S.C. § 152(3) (1976).

[59] *See Brooklyn Eye & Ear Hospital*, 64 LRRM 1344 (1966) (New York); *Regents v. Michigan Employment Relations Comm'n*, 389 Mich. 96, 206 N.W.2d 218 (1973) (Michigan).

tives of the house staff organizations who testified at the hearings pointed out that house staff had been recognized as employees and had been engaging in collective bargaining under state law in New York and Minnesota.[60] As previously noted, the only issue about the status of house staff raised during the hearings concerned the attempt by representatives of the house staff organizations to persuade the committees to exclude house staff from the statutory definition of "supervisors." Not surprisingly, this was the only issue that was explicitly addressed in the committee reports. Given the complete absence of any controversy concerning the employee status of house staff, it is understandable that the legislative history does not contain an explicit directive to the Board to find them to be such. Surely, given this background, Congress did not expect too much in assuming that the Board, which is supposed to carry out its intentions, would not act in clear disregard of its views with respect to house staff as employees.

That the Board's house staff decisions are directly contrary to Congress' intentions is also made clear when the interpretation of congressional intent the Board would have us accept is examined. Before the Health Care Amendments were adopted in 1974, house staff had been engaging in collective bargaining pursuant to state law in a number of states. In two states that allowed collective bargaining in private hospitals—New York and Minnesota—they had been engaging in collective bargaining for some 20 years.[61] Legislation enacted by Congress at the urging of the house staff organizations, and for the purpose of extending the procedures of the Act to col-

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[60] *See Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973, supra* note 32, at 294.

[61] *See* H.R. Rep. No. 1051, *supra* note 31, at 15 (Additional Views of Representatives Quie, Steiger, Eshleman, and Erlenborn).

lective bargaining in nonprofit hospitals, has now been interpreted by the Board not only to deny house staff the right to engage in collective bargaining pursuant to federal law, but also to deny them even those rights they had previously enjoyed under state law.[62] This notwithstanding the fact that appellants sought and received, as the Board itself has acknowledged,[63] assurances from Congress that house staff would not be deprived of their right to collective bargaining by a Board finding that house staff are supervisory employees. The intent the Board would have us attribute to Congress is patently unreasonable. To permit the Board to alter Congress' intent under the guise of making "factual" determinations is even less acceptable.

The full extent to which the majority's decision departs from the teaching of *Leedom v. Kyne* is revealed by its willingness to concede that under its view of the *Kyne* doctrine courts are powerless to prevent the Board from making completely arbitrary decisions about who is an employee under the Act.[64] Presumably the Board is now free to decide that construction workers, plumbers, or carpenters, although they "possess certain employee characteristics," [65] are "primarily" artisans and therefore are not employees within the meaning of the Act.[66] I cannot

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[62] Since the Board has successfully argued to the Second Circuit that national labor policy preempts any state jurisdiction over house staff, *see NLRB v. Committee of Interns & Residents, supra* note 2, its decision that house staff are not employees within the meaning of the Act means that they may not engage in collective bargaining under either state or federal law.

[63] *See* note 34 *supra.*

[64] Majority op., —— F.2d at —— (slip op. at 14-15).

[65] *Cedars-Sinai Medical Center, supra* note 1, 223 NLRB at 251.

[66] Presumably this decision would be based on "policy reasons."

agree that the Board may, under the guise of making factual determinations, ignore congressional intent and completely rewrite the statute Congress enacted to "protect 'laborers' and 'workers' whose rights to organize and bargain collectively had not been recognized by industry" [67] by deciding that these workers are not employees under the Act. It is as if the majority has forgotten the Supreme Court's admonition in *Leedom v. Kyne* that courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." 358 U.S. at 190.[68]

C

As discussed earlier, Congress limited judicial review to unfair labor practice orders under Section 10(f) in order to prevent dilatory tactics that would delay collective bargaining.[69] Courts have frequently rejected pre-election *Kyne* suits because the plaintiff would eventually have the opportunity to force the adverse party to seek a ULP order from the Board, at which time the merits of the case could be argued.[70] This approach derives from

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[67] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 279 (1974).

[68] It is worth stressing that District Court jurisdiction over the Board decision in this case will not lead to the problem of allowing dilatory tactics in representation proceedings that Congress was concerned about when it rejected the suggestion that all Board certification decisions be subject to judicial review. *See* text at notes 5-11 and note 10 *supra*. Since the Board has refused to certify appellants, no issue of delaying certification proceedings arises. Nor should there be concern that this case will create a precedent for District Court jurisdiction in other situations in which there may be an opportunity for delay. This latter possibility provides an adequate basis for denying District Court jurisdiction in such cases.

[69] *See* Part I *supra*.

[70] *See, e.g., Smith Steel Workers v. A. O. Smith Corp.*, 420 F.2d 1, 6 (7th Cir. 1969); *McCulloch v. Libbey-Owens-Ford*

language in *Kyne* pointing out that for the professional employees in that suit "there is no other means, within their control," to protect their rights.[71]

In *Boire v. Greyhound Corp., supra*, for example, the Supreme Court stressed that because Board orders in certification proceedings are not really "final orders," they should not be challenged in court. Litigation following a ULP order, the Court said, can fully explore the validity of the "underlying certification order." 376 U.S. at 476-477. Greyhound, which denied that it was a joint employer of maintenance crews, could have instigated a ULP order by refusing to bargain with the certified representatives of the workers. Then the bus line, as the Supreme Court stated, could have disputed its classification as a joint employer while contesting the ULP order. Thus the availability of eventual recourse to judicial review is an important consideration for a court asked to exercise its equitable powers under the *Kyne* exception.

Glass Co., supra note 16; *Lawrence Typographical Union v. McCulloch, supra* note 17, 349 F.2d at 708 (Bazelon, J., concurring).

[71] *Leedom v. Kyne, supra* note 8, 358 U.S. at 190. Some have claimed that the *Kyne* plaintiffs could have instigated a ULP order by refusing to bargain on behalf of the nonprofessional employees in the bargaining unit. *See Bullard Co. v. NLRB*, 253 F.Supp. 391, 395 (D. D.C. 1966); Note, *Supreme Court, 1958 Term*, 73 HARV. L. REV. 126, 219 (1959). This court's opinion in *Kyne* convincingly disputes that "remote and conjectural" contention:

> Nor is it likely that [the union's] refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

Leedom v. Kyne, supra note 18, 249 F.2d at 492.

But house staff, like the workers in *Kyne* and unlike the employer in *Boire*, have no feasible recourse other than this suit. Any attempt to provoke an unfair labor practice order through recognitional picketing would leave them vulnerable to damage suits by hospitals.[72] By its action the Board has simply excluded these employees from all Board process, from all NLRA rights. These employees have nowhere to turn but to the federal courts. As a result, I believe that the refusal to certify challenged in this suit should be viewed as a final order subject to challenge in the courts.

D

Finally, it is necessary to consider the relationship between the purposes of the NLRA and the exercise of District Court jurisdiction requested by appellants. As my discussion thus far suggests, I believe that, in view of the nature of the Board's error in statutory interpretation, court review is fully consistent with the national labor policy.

In a case interpreting the definition of employee under the Wagner Act the Supreme Court stated that

> the avowed and interrelated purposes of the [NLRA] are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power by "protecting the exercise . . . of full freedom of association, self-organization, and designation of representatives of their own choosing * * *." * * * [73]

Public regulation of labor relations is designed to ensure orderly presentation of worker grievances and demands, and to reduce the strife involved in reconciling workers'

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[72] 29 U.S.C. § 187 (1976).

[73] *NLRB v. Hearst Publications, Inc.*, *supra* note 25, 322 U.S. at 126.

interests with those of management.[74] These purposes also motivated the 1974 Health Care Amendments, which were aimed at preventing disruptions in patient care due to "recognition strikes and picketing."[75] Since I have concluded that the Board misconstrued the legislative direction that house staff be viewed as employees within the Act, exercise of District Court jurisdiction over this case can only support the goals of the national labor policy. Certification of appellants would largely eliminate recognition strikes and could lead to orderly collective bargaining—the "pervasive focus" of the NLRA.[76] Finally, there can be no claim that certification of appellants will delay collective bargaining under the Act, since house staff are currently excluded from statutory coverage.

My conclusion is fortified by a comparison between the situation of house staff here and the circumstances of the *Kyne* plaintiffs. Both groups suffered, through Board error, a loss of rights provided by the NLRA. But in *Kyne* the professional employees still enjoyed the

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[74] *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1976).

[75] *See* sources cited in note 31 *supra*. There were house staff strikes in New York City and Los Angeles in 1975. AMERICAN HOSPITAL ASSOCIATION, *supra* note 1, at 22-23. Government statistics show that in private hospitals generally well over half of the man-days lost due to strikes between 1965 and 1971 were the result of recognition strikes. *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973*, *supra* note 32, at 246-252 (tables from U.S. Bureau of Labor Statistics).

[76] *Internat'l Brhd of Electrical Wkrs v. NLRB*, *supra* note 24, 487 F.2d at 1170. Appellants also contend that the Board's rulings have unconstitutionally deprived them of due process and violated the Tenth Amendment. In view of my conclusion on the statutory issue, I do not reach those claims.

benefits of self-organization and collective bargaining.[77] In contrast, house staff currently have no access to the protections of the NLRA or the machinery of the Board for resolving labor disputes. There can be no serious doubt as to court jurisdiction in such circumstances.

My conclusion does not disturb the Board's discretion in those broad areas in which it may be validly exercised. I simply find that the legislative intent to extend the benefits of the NLRA to house staff may not be contravened by administrative fiat. I have taken pains to emphasize that I leave the *Kyne* exception as I found it: in a narrowly defined set of circumstances, certification decisions of the Board that violate clear and mandatory congressional instructions and that are effectively final orders not otherwise reviewable are subject to review in the District Courts under Section 1337 of Title 28.

Consequently, I would reverse the judgment of the District Court and remand this case for further proceedings.

I respectfully dissent.

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[77] Indeed, it may be argued that the *Kyne* plaintiffs suffered little injury from the Board's action. The requirement that professional employees approve their inclusion in a bargaining unit with nonprofessional workers was designed to prevent situations where a small minority of professional workers would have their interests ignored by bargaining units dominated by other employees. S. Rep. No. 105 (pt. I), 80th Cong., 1st Sess. 11 (1947); H.R. Rep. No. 510, *supra* note 10, at 36. But the professionals in *Kyne* made up more than 95% of the bargaining unit, so the evil feared by Congress was at most a remote possibility.

APPENDIX III

Original Opinion and Judgment of
the Court of Appeals for the
District of Columbia Circuit

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1209

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION *et al.*, APPELLANTS

v.

BETTY SOUTHARD MURPHY *et al.*

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 77-358)

Argued January 24, 1979

Decided April 2, 1979

Murray A. Gordon, of the bar of the Supreme Court of the United States, *pro hac vice*, by special leave of court, with whom *Abraham L. Zwerdling* and *Bernard Katz* were on the brief, for appellants.

Ruth Peters, Attorney, National Labor Relations Board, of the bar of the Supreme Judicial Court of Massachu-

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

setts, *pro hac vice*, by special leave of court, with whom *John S. Irving*, General Counsel, *Carl L. Taylor*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, *Aileen A. Armstrong*, Assistant General Counsel, and *Margery E. Lieber*, Attorney, National Labor Relations Board, were on the brief, for appellees.

Before WRIGHT, *Chief Judge*, ROBB, *Circuit Judge*, and RICHEY,* *District Judge*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* ROBB.

WRIGHT, *Chief Judge*: The National Labor Relations Board (NLRB) denied appellants' petitions under the National Labor Relations Act (NLRA or Act) for certification as bargaining representatives for medical interns, residents, and fellows ("house staff").[1] The Board ruled that since house staff are primarily "students" rather than employees, they are not covered by the Act. Appellants then petitioned the District Court to declare that their members fall within the statutory definition of em-

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* Of the United States District Court for the District of Columbia, sitting by designation pursuant to 28 U.S.C. § 292(a) (1976).

[1] *See Cedars-Sinai Medical Center*, 223 NLRB 251 (1976); *St. Christopher's Hospital for Children*, 223 NLRB 1032 (1976); *University of Chicago Hospitals and Clinics*, 223 NLRB 1002 (1976); *Buffalo General Hospital*, 224 NLRB 76 (1976); *Kansas City General Hospital*, 225 NLRB 108 (1976); *Wayne State University*, 226 NLRB 1062 (1976). In 1976 about two thirds of the nation's 60,000 interns and residents belonged to the Physicians National House Staff Association, one of the appellants here. AMERICAN HOSPITAL ASSOCIATION, TAFT-HARTLEY AMENDMENTS: IMPLICATIONS FOR THE HEALTH CARE FIELD 55 (1976). The other appellants are house staff associations from Cedars-Sinai Medical Center, University of Chicago Hospitals and St. Christopher's Hospital, and the Committee of Interns and Residents.

ployees and to order the Board to assume jurisdiction of their certification petitions.[2] The District Court granted the NLRB's motion to dismiss for lack of jurisdiction because the Act provides for judicial review only of unfair labor practice (ULP) orders, as distinguished from refusals to certify bargaining representatives.[3] Citing *Leedom v. Kyne*, 358 U.S. 184 (1958), which identified a narrow exception to what has functioned as a prohibition of judicial review of non-ULP orders, appellants urge that Section 1337 of Title 28 confers jurisdiction over this action.[4] Because we think the *Kyne* exception applies to this case, we reverse and remand for further proceedings.

I

Restrictions on court review of NLRB rulings date from enactment of the NLRA in 1935. The previous year Congress had approved Public Resolution 44 to implement the labor provisions of the National Industrial

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[2] The definition of employee under the Act is discussed in text at pp. 11-17 *infra*. The NLRB has successfully argued to the Second Circuit that even though the Board will not regulate house staff-hospital labor relations, the national labor policy preempts any state jurisdiction over house staff. *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The court expressly withheld judgment on the question before us today. *Id.* at 816. As a result, house staff do not currently enjoy any of the rights or bear any of the obligations imposed by the NLRA.

[3] *Physicians Nat'l House Staff Ass'n v. Murphy*, 443 F.Supp. 806 (D. D.C. 1978). Section 8 of the Act defines unfair labor practices by both unions and employers. 29 U.S.C. § 158 (1976).

[4] 28 U.S.C. § 1337 (1976):

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

Recovery Act.[5] Congress judged Public Resolution 44 a failure, however, because it permitted judicial review of bargaining representative certification and thereby put off collective bargaining. One committee report complained that under Public Resolution 44, "any attempt by the Government to conduct an election of [bargaining] representatives may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact."[6] In response to this problem the NLRA provided for court review of only unfair labor practice orders.[7] The legislative history demonstrates a clear intent to prevent appeals to the judiciary before workers can elect bargaining representatives.[8] To achieve "prompt initiation of the collective-bargaining process," Congress restricted "time-consuming" judicial review that "might defeat the objectives of the national labor policy."[9] Despite attempts during consideration of the

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[5] 48 STAT. 1183. Public Resolution 44 established enforcement machinery to administer § 7(a) of the National Industrial Recovery Act, 48 STAT. 195, 198, which required that NIRA industrial codes guarantee workers "the right to organize and bargain collectively through representatives of their own choosing * * *."

[6] S. Rep. No. 573, 74th Cong., 1st Sess. 5 (1935). *See* H.R. Rep. No. 1147, 74th Cong., 1st Sess. 6, 23 (1935); Comment, 50 IOWA L. REV. 931, 933-934 (1965); Note, 8 BUFF. L. REV. 372, 377 (1959).

[7] Pub. L. No. 74-198, 49 STAT. 449, 455 (1935).

[8] *See American Fed'n of Labor v. NLRB*, 308 U.S. 401, 411 (1940) ("The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except [following unfair labor practice orders]."); *Inland Empire Council v. Millis*, 325 U.S. 697, 708 (1945); *Leedom v. Kyne*, 358 U.S. 184, 191-194 (1958) (Brennan, J., dissenting).

[9] *Leedom v. Kyne*, *supra* note 8, 358 U.S. at 192-193 (Brennan, J., dissenting).

Taft-Hartley Amendments of 1947 to expand recourse to the courts, the legislation as passed did not disturb this limitation.[10]

Consequently, the current version of the NLRA still aims to foreclose use of the courts to delay the advent of collective bargaining. Section 10(f) permits direct review by the Courts of Appeals, but only after the Board issues an unfair labor practice order.[11] And the provision establishing the certification proceedings involved in this suit similarly authorizes court appeal only of an unfair labor practice order.[12]

In *American Fed'n of Labor v. NLRB*,[13] the Supreme Court first suggested, though it did not hold, that NLRB actions short of unfair labor practice orders might nevertheless be contested in court. In that case the Court declined to rule on the Board's claim that no judicial review whatever was available for non-ULP orders. The issue, the Court said,

> involves a determination whether the Wagner Act [NLRA], in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code [the predecessor to 28

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[10] The House of Representatives initially approved an expansion of District Court review of NLRB certifications. *See* H.R. Rep. No. 245, 80th Cong., 1st Sess. 43, 59-60 (1947). The Senate refused to agree to that change, and it was abandoned in conference. H.R. Rep. No. 510, 80th Cong., 1st Sess. 56-57 (1947).

[11] National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (1976).

[12] *Id.* § 9(d), 29 U.S.C. § 159(d) (1976). Thus the traditional method of obtaining judicial review of a certification proceeding is through a subsequent ULP order.

[13] 308 U.S. 401 (1940).

> U.S.C. § 1337]. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. * * *[14]

The Court applied this approach in *Inland Empire Council v. Millis.*[13] After losing a representation election to another union, the Inland Empire Council challenged the Board's pre-election procedures and protested the exclusion of certain employees from voting. The Board rejected the complaint, and the union sued in District Court. The Supreme Court found that the losing union had failed to show that the Board had "depart[ed] from statutory requirements or from those of due process of law,"[16] so the courts lacked jurisdiction of the claim.

The Supreme Court did not return to this issue until *Leedom v. Kyne, supra,* in 1958.[17] In *Kyne* the Board had certified as a bargaining unit a group of 233 professional employees and nine nonprofessional workers at the Westinghouse Electric Plant in Cheektowaga, New York.[18] The Board's order was in apparent violation of Section 9(b)(1) of the NLRA,[19] which commands that bargaining units shall not include both professional and nonprofessional employees without prior approval of the

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[14] *Id.* at 412.

[15] 325 U.S. 697 (1945).

[16] *Id.* at 700.

[17] The Second Circuit recognized District Court jurisdiction of *constitutional* challenges to non-ULP orders in 1949. *Fay v Douds,* 172 F.2d 720, 723 (2d Cir. 1949); *see Fitzgerald v. Douds,* 167 F.2d 715 (2d Cir. 1948).

[18] 358 U.S. at 185-186.

[19] 29 U.S.C. § 159(b)(1) (1976).

professional workers. The Board did not deny its violation of Section 9(b)(1), but argued simply that the District Court lacked jurisdiction of the suit under the Act. The Supreme Court, however, held that the Board's action could be challenged.

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9(b)(1) is clear and mandatory. * * * [The Board] deprived the professional employees of a "right" assured to them by Congress. Surely, in these circumstances, a Federal District Court has jurisdiction of an original suit to prevent deprivation of a right so given.[20]

The *Kyne* Court's concentration on the "rights" of the employees under the NLRA highlights the issues presented by the case before us. The Court pointed out that if jurisdiction were lacking, there would be " 'a sacrifice or obliteration of a right which Congress' has given professional employees, for there is no other means, within their control * * *, to protect and enforce that right." [21] The opinion concluded, "This Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers." [22]

The exception to nonreviewability of non-ULP orders has been applied infrequently.[23] In 1963 the Supreme

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[20] 358 U.S. at 188-189.

[21] *Id.* at 190, *quoting Switchmen's Union of North America v. NMB*, 320 U.S. 297, 300 (1943).

[22] *Id.*

[23] *See* cases cited in note 29 *infra*.

Court found District Court jurisdiction in a case implicating foreign affairs matters,[24] but the Court did not apply *Kyne* in its only other decision on this issue, *Boire v. Greyhound Corp.*[25] That decision concerned the NLRB's ruling that Greyhound was a joint employer of maintenance crews that were directly employed by another firm under contract to Greyhound. Pointing to the "painstakingly delineated procedural boundaries of *Kyne*," the *Boire* Court held that Greyhound's identity as a joint employer was "essentially a factual issue, unlike the question in *Kyne*, which depended solely upon construction of the statute."[26] Because "[t]he *Kyne* exception is a narrow one," the Court refused to extend it "to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law."[27]

II

This circuit, like the other lower courts, has been frugal in recognizing the *Kyne* exception. We have ruled repeatedly that "the showing that the Board has violated the Act * * * must be strong and clear"[28] before the

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[24] *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1963) ("the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power").

[25] 376 U.S. 473 (1964).

[26] *Id.* at 481.

[27] *Id.*

[28] *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1016 (1969).

equity powers of the District Courts may be invoked under Section 1337.[29] We have insisted that the alleged statutory duty of the Board in such suits must be "clear and mandatory," since "[e]quitable relief is clearly barred in the wide area of determinations which depend on the Board's expertise and discretion * * *."[30]

To preserve the Wagner Act's judgment that judicial review of non-ULP orders can obstruct collective bargaining, we must balance the equitable purpose of the *Kyne* exception against the need to limit recourse to the judiciary.[31] We agree with Professor Jaffe that the

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[29] *See Nat'l Ass'n of Women's & Children's Apparel Salesmen v. NLRB*, 465 F.2d 662 (D.C. Cir. 1972); *Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks*, 402 F.2d 196 (D.C. Cir.), *cert. denied*, 393 U.S. 848 (1968); *Lawrence Typographical Union v. McCulloch*, 349 F.2d 704 (D.C. Cir. 1965); *Local 130, IUERMW v. McCulloch*, 345 F.2d 90 (D.C. Cir. 1965); *Kingsport Press, Inc. v. McCulloch*, 336 F.2d 753 (D.C. Cir.), *cert. denied*, 379 U.S. 931 (1964); *Milk & Ice Cream Drivers Union, Local 98 v. McCulloch*, 306 F.2d 763 (D.C. Cir. 1962); *Atlas Life Ins. Co. v. Leedom*, 284 F.2d 231 (D.C. Cir. 1960); *Leedom v. Internat'l Brhd of Electrical Wkrs*, 278 F.2d 237 (D.C. Cir. 1960); *Internat'l Ass'n of Tool Craftsmen v. Leedom*, 276 F.2d 514 (D.C. Cir.), *cert. denied*, 364 U.S. 815 (1960); *Leedom v. Norwich, Conn. Printing Specialties & Paper Products Union, Local 494*, 275 F.2d 628 (D.C. Cir.), *cert. denied*, 362 U.S. 969 (1960); *Nat'l Biscuit Division v. Leedom*, 265 F.2d 101 (D.C. Cir.), *cert. denied*, 359 U.S. 1011 (1959).

[30] *Leedom v. Kyne*, 249 F.2d 490, 491 (D.C. Cir.), *aff'd*, 358 U.S. 184 (1958).

[31] Professor Cox concluded shortly after *Kyne* that the decision "places all NLRB certifications in the category of reviewable orders." Cox, *The Major Labor Decisions of the Supreme Court October Term 1958*, ABA Section of Labor Relations Law, 1959 Proceedings, *reprinted in* W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW 441, 443 (4th ed. 1960). In rejecting this view courts have focused on (1) the clarity of the alleged violation of the statute, *Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks, supra*

basis for court "intervention" in such cases must be "the type of gross transgression for which we invoke the label 'jurisdictional' or 'clear errors of law' * * *." [32] The factors relevant to this determination are (A) whether the alleged error by the Board involved a question of statutory interpretation or merely an issue of fact; (B) whether the statutory provision is "clear and mandatory" in creating rights for those subject to the NLRA; (C) whether the party challenging the Board's action has a realistic hope of eventual court review following an unfair labor practice order; and (D) the potential for thwarting the purposes of the NLRA which would flow from finding jurisdiction in this case.[33]

A

If the District Court was correct that "[t]he question of the status of house staff members as employees or as students is primarily a factual and definitional determination of the type traditionally left to the discretion of the Board," [34] there is no jurisdiction in the courts to

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note 29, 402 F.2d at 205; and (2) available avenues to challenge the Board decision, *Cox v. McCulloch*, 315 F.2d 48, 50 (D.C. Cir. 1963). *See* Note, *supra* note 6, 8 BUFF. L. REV. at 383 ("inadequacy of review" plus "factor of illegality").

[32] L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 348 (1965).

[33] Our jurisdictional inquiry involves some examination of the merits of appellants' argument. *See Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks, supra* note 29, 402 F.2d at 199, 205. This is necessary if we are to preserve the policy of holding the courthouse door not "wholly closed," yet also not "widely ajar." *Local 130, IUERMW v. McCulloch, supra* note 29, 345 F.2d at 97.

[34] *Physicians Nat'l House Staff Ass'n v. Murphy, supra* note 3, 443 F.Supp. at 810. There is no dispute here as to what constitutes house staff. The only issue is whether they are employees under the Act.

hear this case. Appellants insist, however, that the legislative histories of the NLRA and the 1974 Health Care Amendments to that statute [35] affirmatively demonstrate a congressional intent to cover house staff under the Act. To decide this question we must examine the definition of "employee" under the Act and the effect of the 1974 Amendments.[36]

Section 2(3) of the NLRA provides: "The term 'employee' shall include any employee * * * unless this sub-

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[35] Pub. L. No. 93-360, 88 STAT. 395 (1974).

[36] *See Internat'l Brhd of Electrical Wkrs v. NLRB*, 487 F.2d 1143, 1170-1171 (D.C. Cir. 1973) (*en banc*), *aff'd sub nom. Florida Power & Light Co. v. Internat'l Brhd of Electrical Wkrs, Local 641*, 417 U.S. 790 (1974):

> In the final analysis, "administrative experience is of weight in judicial review only to this point—it is a persuasive reason for deference to the [Board] in the exercise of its discretionary powers under and within the law. It cannot be invoked to support action outside of the law. And what action is, and what is not, within the law must be determined by the courts, when authorized to review, no matter how much deference is due to the agency's fact finding. Surely an administrative agency is not a law unto itself * * *." * * *

Quoting SEC v. Chenery Corp., 332 U.S. 194, 215 (1947) (Jackson, J., dissenting). *See also SEC v. Sloan*, 436 U.S. 103, 118 (1978):

> "The construction put on a statute by the agency charged with administering it is entitled to deference by the courts * * *. * * * But the courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291." * * *

Quoting Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968).

chapter explicitly states otherwise * * *." [37] The Supreme Court has held that "the broad language of the Act's definitions, which in terms reject conventional limitations on such conceptions as 'employee,' * * * leaves no doubt that its applicability is to be determined broadly * * *." [38] The breadth of the definition has been retained through the express statutory exclusion of only a few groups of workers—agricultural workers, domestic laborers, family workers, independent contractors, and supervisory employees.[39] Notably, house staff are not excluded from the Act in terms.[40] Quite the reverse is true.

The Taft-Hartley Amendments distinguished between professional and nonprofessional employees for determination of appropriate bargaining units.[41] This distinction applies only after the Board has determined that workers fall within the definition of employee in Section 2(3). Nevertheless, the definition of professional

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[37] 29 U.S.C. § 152(3) (1976).

[38] *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 129 (1944) (footnote omitted).

[39] Section 2(3) excludes

> any individual employed as an agricultural laborer; or in the domestic service of any family or person at his home, or * * * employed by his parent or spouse, or * * * having the status of an independent contractor, or * * * employed as a supervisor, or * * * by an employer subject to the Railway Labor Act * * *.

29 U.S.C. § 152(3) (1976).

[40] Indeed, there was no exclusion for nonprofit hospitals in the NLRA until 1947, *see* note 45 *infra*, so there is no evidence in the Wagner Act of concern over the appropriateness of public regulation of labor relations in hospitals.

[41] 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT OF 1947 at 1663-1664 (1948) (hereinafter cited as LEGISLATIVE HISTORY).

employee reflects the legislative understanding as to which workers fall within the broader definition of employee. The relevant passage provides:

> (12) The term "professional employee" means—
>
> (a) any employee engaged in work * * * (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital * * *; or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).[42]

The House Conference Report on the Taft-Hartley Act described this definition as applying to "such persons as legal, engineering, scientific and *medical personnel together with their junior professional assistants.*" [43] As NLRB Member (now Chairman) Fanning urged in dissent to one of the Board's house staff decisions, "[T]he definition fits, *precisely*, housestaff officers." [44]

In response to a spate of recognition strikes in the hospital industry, Congress extended NLRB jurisdiction to nonprofit health care facilities in the 1974 Health Care Amendments.[45] The legislative history of these

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[42] 29 U.S.C. § 152(12) (1976).

[43] H.R. Rep. No. 510, *supra* note 10, at 36 (emphasis added).

[44] *Cedars-Sinai Medical Center*, *supra* note 1, 223 NLRB at 258 (Member Fanning, dissenting) (emphasis in original).

[45] S. Rep. No. 766, 93d Cong., 2d Sess. 3 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 4, 5 (1974). Under a provision offered from the floor of the Senate, the Taft-Hartley Amend-

amendments provides substantial support for the view that Congress intended that house staff be covered by the NLRA. In Senate hearings spokesmen for appellants argued for a new provision specifying that house staff are not "supervisory employees" excluded from the coverage of the Act under Section 2(11).[46] The committee reports on the legislation explain why that suggestion was not adopted.

> Various organizations representing health care professionals have urged [exclusion of] such professionals from the definition of "supervisor". The Committee has studied this definition with particular reference to health care professionals, such as * * * interns, residents, fellows, * * * and concludes that the proposed amendment is unnecessary * * *. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees * * *, which direction is incidental to the professional's treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer.[47]

The clear assumption underlying this discussion of the supervisory status of house staff is that they are otherwise within the definition of employee in the Act. This view is buttressed by comments on the floor of the Senate. In introducing the legislation, Senator Cranston, co-manager of the bill, explained that the amendments

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ments had exempted nonprofit hospitals from the NLRA. H.R. Rep. No. 510, *supra* note 10, at 31-32; 2 LEGISLATIVE HISTORY, *supra* note 41, at 1662.

[46] *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 291-423 (Aug. 1, 1973).

[47] S. Rep. No. 766, *supra* note 45, at 6; *see* H.R. Rep. No. 1051, *supra* note 45, at 7.

would grant collective bargaining rights to "notoriously underpaid" hospital workers, including "doctors." [48] He added:

> According to [the] president of the Physicians National Housestaff Association, the average house staff officer—intern, resident, or fellow—works 70 to 100 hours per week, and earns about $10,000 per year. His hourly wage, then, ranges from $1.92 to $2.74.[49]

Senator Cranston would certainly not have cited interns in this statement unless he understood them to be covered by the legislation he was offering.

Even one of the opponents of the 1974 Health Care Amendments, Senator Dominick, referred repeatedly to the coverage of house staff under the bill, grouping house staff together with other hospital employees.[50] When the amendments came up for a final vote he stated, "I know that nurses, staff physicians, and others are in favor of the principle of collective bargaining[,]" [51] and added:

> I am sure as dedicated professional nurses, staff physicians, and other hospital employees * * * would never jeopardize their patients[']' well being [*sic*]. The balancing of these groups' rights as employees to form bargaining units with the public interest in

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[48] 120 CONG. REC. 12937 (1974). As graduates of medical colleges and licensed physicians, house staff are, of course, doctors.

[49] *Id.*

[50] For example, Senator Dominick noted assurances he had received that if the nonprofit hospital exemption were removed "house staff physicians * * * would never go on strike." *Id.* at 12971.

[51] *Id.* at 22580.

> access to health care has given us some special features in this bill * * *. * * *[52]

In light of these congressional statements, we must agree with the Second Circuit's statement that Congress

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[52] *Id.* Subsequent statements by lawmakers, though not directly applicable to this case, further support our conclusion here. *See* H.R. Rep. No. 980, 95th Cong., 2d Sess. 4 (1978) ("it is clear that we never intended or expected that housestaff labor relations and disputes, including strikes, be left wholly unchecked and unregulated by the act"); *Oversight Hearings on the National Labor Relations Act: Hearings on H.R. 8404, etc., Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor*, 94th Cong., 2d Sess. 492 (1976) ("it was clearly and absolutely not the intention of the author of the legislation, of its sponsors, and nowhere in the report of the legislative history is it indicated, that interns and residents are to be considered as students") (Rep. Thompson); *Hospital Housestaff as Professional Employees: Hearings on H.R. 2222 Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor*, 95th Cong., 1st Sess. 37 (1977) ("amazed" by NLRB exclusion of house staff under § 2(3)) (Rep. Ashbrook); *id.* ("[t]he congressional intent was obviously to include" house staff) (Rep. Thompson).

The Board argues that because legislation has been introduced in Congress, but not enacted, that would explicitly cover house staff under the NLRA, we should conclude that Congress does not wish house staff to be covered. We do not find this contention compelling. One would expect congressional reluctance to abandon the NLRA's wise policy of reaching *all* workers, with a *few* exceptions, in favor of listing all groups to be covered by the Act, an exercise that would inevitably be incomplete, would require constant review to keep up with new industries, and would pose difficult interpretational questions for the Board and the courts. Moreover, courts should be wary of reading meaning into congressional inaction. *See* Powell, *The Still Small Voice of the Commerce Clause, in* 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 931, 932 (1938) (comparing when Congress is "silently silent" and when it is "silently vocal").

"considered housestaffs within the scope of the Health Care Amendments." [53] As employees under the NLRA, house staff may not be deprived of rights "assured to them by Congress." *Leedom v. Kyne, supra*, 358 U.S. at 189. We reach this conclusion not on the basis of factual characteristics of the hospital industry or the work performed by house staff, but on the terms of the statute itself and its legislature history.[54]

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[53] *NLRB v. Committee of Interns & Residents, supra* note 2, 566 F.2d at 815.

[54] Our consideration of the legislative history on this question is similar to the approach taken by both the majority and the dissenters for the Supreme Court in *NLRB v. Catholic Bishop of Chicago*, —— U.S. ——, 47 U.S. L. WEEK 4283 (March 21, 1979) (hereinafter cited as *Catholic Bishop* to Law Week pages only). Chief Justice Burger's opinion for the majority concluded after "close examination" of the legislative history of the NLRA that Congress did not extend the protections of the Act to church-operated schools, 47 U.S. L. WEEK at 4287-4288, while Justice Brennan in dissent disputed the majority's view of the jurisdiction conferred by the statute. Because the Act does not use what our dissenting colleague calls "plain statutory language" extending the Board's coverage to specific groups, *see* dissent at 2, both the Burger and Brennan opinions resort to the legislative history and refer to exactly the same legislative materials that we canvass today. Moreover, we believe that the specific congressional statements on house staff—including the statutory definition of professional employee, the accompanying committee explanation in 1947, and the committee statement and floor statements in 1974—easily satisfy the Chief Justice's requirement of "a clear expression of affirmative intention." *Catholic Bishop, supra*, 47 U.S. L. WEEK at 4287. In contrast, the dissent in *Catholic Bishop* cites only one statement by a prominent senator, *id.* at 4290, and more general statements as to the breadth of NLRB jurisdiction over nonprofit institutions, *id.* at 4290 & n.7. We certainly do not disparage the judgment of the four dissenting Justices that that legislative history was sufficient to establish Board jurisdiction over parochial school teachers, but we emphasize the greater support for our finding today.

Although we find that the Board misconstrued a provision of the NLRA, the *Kyne* exception requires violation of a "clear and mandatory" statutory requirement creating rights under the Act.[55] This criterion has not been interpreted woodenly, however. The Act clearly directs that employees receive the protections it provides. In *Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch*[56] this court held that the *Kyne* exception applies to positive commands of the NLRA as well as to negative prohibitions as in *Kyne*.[57] *Miami Pressmen* also found that the statutory provision involved in that case, though "not mandatory in all instances," did impose a mandatory duty "[o]n these facts."[58]

Our earlier discussion establishes the clarity of the congressional intent on this matter.[59] Satisfaction of the statutory definition involved here triggers specific Board

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[55] *See Internat'l Brhd of Teamsters v. Brhd of Railway, Airline & Steamship Clerks, supra* note 29, 402 F.2d at 205 ("the assertion of jurisdiction [is confined] to cases where the error on the merits is as obvious on the face of the papers as the violation of specific statutory language"); *Lawrence Typographical Union v. McCulloch, supra* note 29, 349 F.2d at 706 n.3 ("A mere allegation in the complaint that the Board has violated the Act does not confer jurisdiction. The violation must be proved.").

[56] 322 F.2d 993 (D.C. Cir. 1963).

[57] *Id.* at 997. *See Terminal Freight Handling Co. v. Solien*, 444 F.2d 699, 703 (5th Cir. 1971), *cert. denied*, 405 U.S. 996 (1972); *Nat'l Maritime Union of America v. NLRB*, 375 F. Supp. 421, 429 (E.D. Pa.), *aff'd*, 506 F.2d 1052 (3d Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

[58] 322 F.2d at 997, 998.

[59] *See* Part II-A *supra*.

action, after an appropriate petition for certification, to hold representation elections as required by Section 9(c)(1) of the Act.[60] By denying that house staff are employees under the Act, the Board contravened the legislative direction that house staff and hospitals have access to Board-administered collective bargaining. Section 7 of the Act provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.[61]

The "Findings and declaration of policy" in the NLRA echo this guarantee of employee rights,[61] and both the Board and the courts have the responsibility to enforce these rights.[62] In its decisions excluding house staff from

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[60] 29 U.S.C. § 159(c)(1) (1976). The provision states that if, upon petition by "an employee or group of employees," the Board finds that "a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

[61] 29 U.S.C. § 157 (1976). *See also Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-544 (1972); *NLRB v. Textile Wkrs Union of America, Local 1029*, 409 U.S. 213, 216 (1972).

[62] 29 U.S.C. § 151 (1976):

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[63] *See Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345 (3d Cir. 1969), *cert. denied*, 397 U.S. 935 (1970).

its coverage, the Board failed to satisfy this most fundamental mandate of the NLRA.

The only possible exception to the Board's duty in this case would be under Section 14(c) of the Act, which permits the Board to decline jurisdiction over employers having an insubstantial effect on commerce.[64] But the 1974 Health Care Amendments expressly extend NLRA coverage to the nonprofit hospitals that employ house staff, so no such issue is present in this case.

C

As discussed earlier, Congress limited judicial review to unfair labor practice orders under Section 10(f) in order to prevent dilatory tactics that would delay collective bargaining.[65] Courts have frequently rejected pre-election *Kyne* suits because the plaintiff would eventually have the opportunity to force the adverse party to seek a ULP order from the Board, at which time the merits of the case could be argued.[66] This approach derives

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[64] 29 U.S.C. § 164(c)(1) (1976):

> The Board, in its discretion, may, by rule of decision or by published rules * * *, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction[.] * * *

See Hotel Employees Local No. 255 v. Leedom, 358 U.S. 99 (1958); *Office Employes Internat'l Union, Local No. 11 v. NLRB*, 353 U.S. 313 (1957).

[65] *See* text at pp. 3-5 *supra*.

[66] *See, e.g., Smith Steel Wkrs v. A. O. Smith Corp.*, 420 F.2d 1, 6 (7th Cir. 1969); *McCulloch v. Libbey-Owens-Ford Glass Co., supra* note 28; *Lawrence Typographical Union v. McCulloch, supra* note 29, 349 F.2d at 708 (Bazelon, J., concurring).

from language in *Kyne* pointing out that for the professional employees in that suit "there is no other means, within their control," to protect their rights.[67]

In *Boire v. Greyhound Corp., supra,* for example, the Supreme Court stressed that because the Board orders in certification proceedings are not really "final orders," they should not be challenged in court. Litigation following a ULP order, the Court said, can fully explore the validity of the "underlying certification order."[68] Greyhound, which denied that it was a joint employer of maintenance crews, could have instigated a ULP order by refusing to bargain with the certified representatives of the workers. Then the bus line, as the Supreme Court stated, could have disputed its classification as a joint employer while contesting the ULP order. Thus the availability of eventual recourse to judicial review is an important consideration for a court asked to exercise its equitable powers under the *Kyne* exception.

But house staff, like the workers in *Kyne* and unlike the employer in *Boire*, have no feasible recourse other

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[67] 358 U.S. at 190. Some have claimed that the *Kyne* plaintiffs could have instigated a ULP order by refusing to bargain on behalf of the nonprofessional employees in the bargaining unit. *See Bullard Co. v. NLRB*, 253 F.Supp. 391, 395 (D. D.C. 1966); Note, *Supreme Court, 1958 Term*, 73 HARV. L. REV. 126, 219 (1959). This court's opinion in *Kyne* convincingly disputes that "remote and conjectural" contention:

> Nor is it likely that [the union's] refusal to bargain for the nine non-professionals would induce the employer to seek review since he would then be free to deal with all employees individually. Nor could we expect such refusal to induce any of the nine non-professionals to seek review. They are hardly likely to insist upon placing their fate in the hands of a reluctant bargaining representative.

Leedom v. Kyne, supra note 30, 249 F.2d at 492.

[68] 376 U.S. at 476-477.

than this suit. Any attempt to provoke an unfair labor practice order through recognitional picketing would leave them vulnerable to damage suits by hospitals.[69] By its action the Board has simply excluded these employees from all Board process, from all NLRA rights. These employees have nowhere to turn but to the federal courts. As a result, we believe that the refusal to certify challenged in this suit should be viewed as a final order subject to challenge in the courts.

D

Finally, we must consider the relationship between the purposes of the NLRA and the exercise of District Court jurisdiction requested by appellants. As our discussion thus far suggests, we believe that, in view of the nature of the Board's error in statutory interpretation, court review is fully consistent with the national labor policy.

In a case interpreting the definition of employee under the Wagner Act the Supreme Court stated that

> the avowed and interrelated purposes of the [NLRA] are to encourage collective bargaining and to remedy the individual worker's inequality of bargaining power by "protecting the exercise . . . of full freedom of association, self-organization, and designation of representatives of their own choosing * * *." * * * [70]

Public regulation of labor relations is designed to ensure orderly presentation of worker grievances and demands, and to reduce the strife involved in reconciling workers' interests with those of management.[71] These purposes

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[69] 29 U.S.C. § 187 (1976).

[70] *NLRB v. Hearst Publications, Inc., supra* note 38, 322 U.S. at 126.

[71] *See* National Labor Relations Act § 1, 29 U.S.C. § 151 (1976).

also motivated the 1974 Health Care Amendments, which were aimed at preventing disruptions in patient care due to "recognition strikes and picketing." [12] Since we have concluded that the Board misconstrued the legislative direction that house staff be viewed as employees within the Act, exercise of District Court jurisdiction over this case can only support the goals of the national labor policy. Certification of appellants would largely eliminate recognition strikes and could lead to orderly collective bargaining—the "pervasive focus" of the NLRA.[13] Finally, there can be no claim that our decision will delay collective bargaining under the Act, since house staff are currently excluded from statutory coverage.

Our determination is fortified by a comparison between the situation of house staff here and the circumstances of the *Kyne* plaintiffs. Both groups suffered, through Board error, a loss of rights provided by the NLRA. But in *Kyne* the professional employees still enjoyed the benefits of self-organization and collective bargaining.[14] In

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[12] *See* sources cited in note 45 *supra*. There were house staff strikes in New York City and Los Angeles in 1975. AMERICAN HOSPITAL ASSOCIATION, *supra* note 1, at 22-23. Government statistics show that in private hospitals generally well over half of the man-days lost due to strikes between 1965 and 1971 were the result of recognition strikes. *Coverage of Nonprofit Hospitals Under National Labor Relations Act, 1973*, *supra* note 46, at 246-252 (tables from U.S. Bureau of Labor Statistics).

[13] *Internat'l Brhd of Electrical Wkrs v. NLRB*, *supra* note 36, 487 F.2d at 1170. Appellants also contend that the Board's rulings have unconstitutionally deprived them of due process and violated the Tenth Amendment. In view of our decision on the statutory issue, we do not reach those claims.

[14] Indeed, it may be argued that the *Kyne* plaintiffs suffered little injury from the Board's action. The requirement that professional employees approve their inclusion in a bargaining unit with nonprofessional workers was designed to prevent situations where a small minority of professional work-

contrast, house staff currently have no access to the protections of the NLRA or the machinery of the Board for resolving labor disputes. There can be no serious doubt as to court jurisdiction in such circumstances.

Our decision does not disturb the Board's discretion in those broad areas in which it may be validly exercised. We simply hold that the legislative intent to extend the benefits of the NLRA to house staff may not be contravened by administrative fiat. We have taken pains to emphasize that we leave the *Kyne* exception as we found it: in a narrowly defined set of circumstances, certification decisions of the Board that violate clear and mandatory congressional instructions and that are effectively final orders not otherwise reviewable are subject to review in the District Courts under Section 1337 of Title 28.

Consequently, we remand this case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

ROBB, *Circuit Judge, dissenting*: I would affirm the judgment of the District Court on the grounds stated in the able opinion of the district judge. *Physicians National House Staff Ass'n v. Murphy*, 443 F. Supp. 806 (D.D.C. 1978).

The National Labor Relations Act does not define the term "employee" as used in the Act; the task of decision on the facts of each case is assigned to the National Labor Relations Board. *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *NLRB v. E. C. Atkins & Co.*, 331 U.S. 398 (1947); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977). Whether a particular individual is an employee depends upon the facts. In this case the Board carefully analyzed the facts and reached the conclusion that interns, residents and clinical fellows are primarily engaged in graduate educational training and that their status is therefore that of students rather than of employees; that the programs in which they participate were "designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice." *Cedars-Sinai Medical Center*, 223 N.L.R.B. 253 (1976). The District Court had no jurisdiction to review this determination by the Board. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943); *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964); *Brotherhood of Railway & Steamship Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965); *Local 130 International Union of Electrical Workers v. McCulloch*, 120 U.S. App. D.C. 196, 345 F.2d 90 (1965).

In an effort to avoid the prohibition of District Court jurisdiction established by this long line of decisions beginning with the *Switchmen's Union* case in 1943, the majority invokes *Leedom v. Kyne*, 358 U.S. 184 (1958).

I think the majority's attempt fails. As the majority recognizes, in *Leedom v. Kyne* the Board violated the plain command of the statute, that bargaining units shall not include both professional and non-professional employees without prior approval of the professionals. The Supreme Court held that the District Court had jurisdiction because the Board's order was "in excess of its delegated powers and contrary to a specific prohibition in the Act", that section 9(b)(1) of the Act, which the Board had violated, was "clear and mandatory". *Id.* at 188. In the case before us the majority of course cannot contend that any "specific" or "clear and mandatory" provision of the Act confers the status of employees upon interns, residents and clinical fellows. My colleagues however attempt to derive a clear, mandatory and specific statutory direction from vague statements in committee reports and the remarks of individual members of Congress. I am not persuaded by this attempted alchemy. In my opinion Congress would have said so in plain statutory language if it intended by statutory mandate to exempt interns, residents and clinical fellows from the long-established rule that whether a particular individual is an "employee" is a question to be answered, at least in the first instance, by the Board.

The majority stays "the availability of eventual recourse to judicial review is an important consideration for a court asked to exercise its equitable powers under the *Kyne* exemption. But house staff, like the workers in *Kyne* and unlike the employer in *Boire*, have no feasible recourse other than this suit." This argument would of course apply to any worker whom the Board declines to recognize as an employee, and any losing union in a representation case; and the argument has been rejected by the Supreme Court. *Switchmen's Union v. National Mediation Board*, 320 U.S. 297 (1943). In that case a union which had failed to be certified as the representative of employees of a carrier brought suit in

the District Court, challenging the National Mediation Board's determination. The Supreme Court held that the District Court had no jurisdiction, saying:

> The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. *Great Northern Ry. Co. v. United States*, 277 U.S. 172, 182. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved.

Id. at 303.

In his dissent in *Leedom v. Kyne*, 258 U.S. at 195-96, Mr. Justice Brennan wrote:

> I daresay that the ingenuity of counsel will, after today's decision, be entirely adequate to the task of finding some alleged "unlawful action," whether in statutory interpretation or otherwise, sufficient to get a foot in a District Court door under 28 U.S.C. § 1337.

In my opinion, with all respect, the ingenuity of counsel and my colleagues in this case is not adequate to open the door of the District Court. Accordingly I dissent.

APPENDIX IV

Order of the Court of Appeals for
the District of Columbia Circuit
Granting Petition for Rehearing
En Banc

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1209 September Term, 1978

Physicians National House Staff Association et al.,

Appellants

v.

Betty Southard Murphy et al.

D.C. Civil Action No. 77-358

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Filed April 2, 1979

GEORGE A. FISHER
Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BEFORE: WRIGHT, Chief Judge, ROBB, Circuit Judge, and RICHEY* United States District Judge for the District of Columbia

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court

that the judgment of the District Court appealed from in this cause is hereby reversed and the case is remanded to the District Court for further proceedings, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

Date: April 2, 1979
Opinion for the Court filed by Chief Judge Wright.
Dissenting opinion filed by Circuit Judge Robb.

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 28-1209

September Term, 1978

Physicians National House Staff Association, et al.,

Appellants

v.

Betty Southard Murphy, et al.

UNITED STATES COURT OF APPEALS for the District of Columbia Circuit

Filed Jun 5, 1979

GEORGE A. FISHER
Clerk

BEFORE: Wright, Chief Judge; Bazelon, McGowan, Tamm, Leventhal, Robinson, MacKinnon, Robb, and Wilkey, Circuit Judges

O R D E R

Upon consideration of the suggestion for rehearing en banc filed by appellees, and of the memoranda filed by the American Medical Colleges, et al., and the Greater New York Hospital Association, et al., as amici curiae in support of the suggestion for rehearing en banc, it is

ORDERED, by the Court, en banc, that

the above captioned case shall be reheard by the Court sigging en banc. The Clerk is directed to schedule this case for oral argument during the September Term, 1979. And it is

FURTHER ORDERED, by the Court, en banc, sua sponte, that the judgment and opinions entered in this case on April 2, 1979 be, and hereby are, vacated.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

APPENDIX V

Opinion and Order of the District Court for the District of Columbia (Flannery, J.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, et al.,	)	Civil Action No. 77-358
Plaintiffs,	)	
v.	)	Filed Jan. 17, 1978
BETTY SOUTHARD MURPHY, et al.,	)	JAMES F. DAVEY, Clerk
Defendants.	)	

MEMORANDUM

This matter comes before the court on defendants' motion to dismiss or in the alternative for summary judgment, and on plaintiffs' cross-motion for summary judgment. The facts in this case are not in dispute. In 1974, Congress passed the Health Care Amendments, 88 Stat. 395 (July 26, 1974), to the National Labor Relations Act, 29 U.S.C. §§ 151, et seq., which extended the jurisdiction of the National Labor Relations Board (herein-

after N.L.R.B.) to include employers who are non-profit health care institutions. 29 U.S.C. §152(2) (Supp. IV 1974). Plaintiffs are unincorporated associations whose memberships are composed of medical interns, residents, and clinical fellows (collectively referred to as house staff) at various non-profit health care institutions. Prior to the enactment of the 1974 amendments, house staff associations in several states had been certified by state labor boards to engage in collective bargaining. After Congress passed these amendments, plaintiffs petitioned the N.L.R.B. to orderthe holding of elections to certify the house staff associations as the sole bargaining agents of the house staff members. In its first decision on this matter, Cedars-Sinai Medical Center, 233 N.L.R.B. 251 (1976), the Board con-

cluded that although house staff members possessed "certain employee characteristics," they were "primarily engaged in graduate training" and "their status is therefore that of students rather than of employees" within the definition of employee provided in 29 U.S.C. § 162(3). Since a valid labor organization as defined by 29 U.S.C. § 152(5) must consist of employees, the Board decided that the house staff associated was not eligible for union certification. The Board issued a series of similar decisions regarding the applications of other house staff associations. University of Chicago, 223 N.L.R.B. 1032 (1976); St. Clare's Hospital, 223 N.L.R.B. 1002 (1976); St. Christopher's Hospital, 223 N.L.R.B. 166 (1976).

After releasing these decisions, the

Board, upon a petition to rehear, issued a revised opinion in Kansas City General Hospital, 225 N.L.R.B. No. 14A (November 8, 1976). In this revised opinion, the Board indicated that its intention in the series of prior decisions on the issue of representational status for house staff associations was to preempt this area from state regulation. In other words, the Board indicated that, in exercising its discretion and finding that house staff members were not employees it was establishing a national labor relations policy that no collective bargaining rights should be extended to the house staffs, not even by state labor relations boards. The Second Circuit has found that this exercise of the preemption power was proper, N.L.R.B. v. Committee of Interns and Residents, __F.2d __. CA 77-6075 (2d

Cir., Sept. 21, 1977), although the court there expressly declined to pass on the correctness of the Board's finding that house staff members were not employees and the associations were not, therefore, labor organizations. Id., slip op, at 12.

Plaintiffs have filed this suit in District Court asking that this court (1) vacate the N.L.R.B.'s dismissal of the plaintiffs' representation petitions, (2) declare that plaintiffs are labor organizations and their members employees within the meaning of the Act, and (3) order the Board to assume jurisdiction over plaintiffs on this basis. Defendants, who are the members of the N.L.R.B., have moved for dismissal on the grounds that this court does not have jurisdiction over this matter and that the complaint fails to state a claim for which

relief can be granted. Alternatively, pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure, the defendants have moved for summary judgment. For the reasons indicated below, this court holds that it should dismiss this action for want of jurisdiction.

The complaint before the court presents a traditionally troublesome jurisdictional question in the field of labor law. 29 U.S.C. § 160(f) provides that the United States Circuit Court of Appeals may review a final order of the N.L.R.B. which involves the finding or allegation of an unfair labor practice. The N.L.R.B. orders which plaintiffs in this case have asked the court to review contain no such unfair labor practice, and, therefore, review by this Circuit Court is foreclosed. Local 130, Internat'l Union of

Elec., Radio & Machine Workers v. McCulloch, 345 F.2d 90, 95 (D.C. Cir. 1965). The N.L.R.B. orders involved in the present case are purely representational matters, and although Circuit Court review is not possible, the Act does not provide for District Court review of any kind. Faced with this situation, the Supreme Court has indicated that it will not lightly find that Congress intended to foreclose all review of such decisions. Leedom v. Kyne, supra, the Supreme Court confronted a situation in which the N.L.R.B., despite a finding that one group of employees was professional, nevertheless ordered the two groups joined in one bargaining unit and an election held. The victorious union, which had originally represented only professional employees, brought suit to

invalidate the Board's action. The union based its suit on the fact that 29 U.S.C. § 159(b)(10) expressly prohibits the mixing of professional and non-professional employees in one unit without the approval of a majority of the professional employees involved. The Board in this instance had refused to allow the professional employees to take a vote on the matter. Judge Matthews of the United States District Court for the District of Columbia took jurisdiction because of the clear violation of the act, and vacated the Board's decision. In affirming this, the Supreme Court stated that this was not a suit to review a decision within the Board's authority to make, but to

> strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act. Section 9(b)(1) is clear and mandatory.

Id. at 188, 79 S.Ct. at 184. Section 9(b)(1) created a statutory right, and the Board's action in derogation of this right was "an attempted exercise of power that had been specifically withheld" by Congress. Id. at 189, 79 S.Ct. at 184. The Court held that such exceptional circumstances warranted the District Court's taking jurisdiction.

Kyne is the leading case in this area, and plaintiffs would have this court read Kyne expansively. However, the Supreme Court has restricted the application of the Kyne doctrine. In Boire v. Greyhound Corp., 376 U.S. 473, 84 S.Ct. 894 (1964), the N.L.R.B. had ruled that Greyhound and the company holding the maintenance contracts for certain bus stations were joint employers of the maintenance employees. The district

court, invoking Kyne, indicated that it felt that the Board had incorrectly assessed the facts in the situation, and therefore vacated the Board's order. The Supreme Court reversed. The Court recognized that normally N.L.R.B. orders are not reviewable absent a finding or allegation of an unfair labor practice. Id. at 476-77, 84 S.Ct. at 896. The Court indicated that although "this indirect method of obtaining judicial review imposes a significant delay upon attempts to challenge the validity of Board orders in certification proceedings," this was the Court's interpretation of Congress' intent. Id. at 477-78, 84 S.Ct. at 897. The Court then recognized two types of cases, both "characterized by extraordinary circumstances," in which district courts may take jurisdiction. Id. at 480, 84 S.Ct. at 898. One is a case like

Kyne, supra, where the suit is not to review but to strike down an order of the Board made in excess of its delegated powers and contrary to a specific, mandatory provision of the Act. The other type of case occurs when a Board order presents a public question of national importance due to its international implication. See McCulloch v. Sociedad Nacional de Marineras de Honduras, 372 U.S. 10, 83 S.Ct. 671 (1963) (labor dispute involving the unionization of foreign nationals). Only the first, or Kyne-type case is relevant to the suit at hand, and the Supreme Court in Boire specifically commented on the narrow nature of the Kyne exception:

> [W]hether Greyhound possessed sufficient indicia of control to be an "employer" is essentially a factual issue, unlike the question in Kyne, which depended solely upon construction of the statute. The Kyne ex-

> ception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the board has led it to a conclusion which does not comport with the law. Judicial review in such situations has been limited by Congress to the courts of appeals, and then only under the conditions explicitly laid down in § 9(d) of the Act.

376 U.S. at 481, 84 Stat. at 899.

The Supreme Court's direction that the Kyne exception be narrowly applied has been followed closely in this circuit. In Local 130, Internat'l Union of Elec., Radio & Machine Workers v. McCulloch, 345 F.2d 90 (D.C. Cir. 1965), the court affirmed the district court's dismissal of a suit to review an N.L.R.B. representational order, stating that Congress had given the Board the preeminent role in such disputes. Id. at 94. Since the N.L.R.B. has developed an expertise in

these matters, "the requisite showing of statute violation and constitutional deprivation must be strong indeed to justify" departing from the general rule of non-reviewability. Id. After reviewing the "limited exception" created by Kyne, the court stated:

> [T]o say that there are possible infirmities in an action taken by the Board by reason of an erroneous or arbitrary exertion of its authority in respect of the facts before it is not to conclude that there is jurisdiction in the District Court to intervene by injunction. For such jurisdiction to exist, the Board must have stepped so plainly beyond the bounds of the Act, or acted so clearly in defiance of it, as to warrant the immediate intervention of an equity court even before the Board's own processes have run their course. Infirmities short of this may exist in the Board's order here under attack, but that question is not now before us, any more than it was before the District Court; and we intimate no opinion with respect to it. Our inquiry is into the jurisdiction of the District Court to review the Board's order, and that injury touches only tangentially upon the merits of the

> order as those merits would be appraised in a statutory review proceeding.

Id. at 95. In the absence of a finding of "palable disregard to the command of the statute," the district court has no jurisdiction over such a suit. Id. at 96. Merely alleging such disregard in the complaint is not sufficient; the violation "of a clear, specific, and mandatory provision of the Act" must be proved. Lawrence Typographical Union v. McCulloch, 349 F.2d 704, 706 (D.C. Cir. 1965). The district court may not review the appropriateness of the Board's factual determinations. Id. at 707. Accord, McCulloch v. Libbey-Owens-Ford Glass Co., 403 F.2d 916, 917 (D.C. Cir. 1968). Similarly, when the alleged violation is not of the statute but of the Constitution, the showing of the deprivation of

constitutional rights must be strong and clear. National Ass'n of Women's and Children's Apparel Salesmen, Inc. v. N.L.R.B., 465 F.2d 662, 663 (D.C. Cir. 1972) (Board's discretionary determination that plaintiff was not a labor organization did not deprive plaintiff of procedural due process).

These cases make it clear that the burden plaintiffs must bear in proving that this court has jurisdiction is an extremely heavy one. Plaintiffs have sought to shoulder this burden first by urging the court to adopt the policy of the Administrative Procedure Act favoring judicial review. Plaintiffs place primary reliance in this regard on the decision in Dunlop v. Bachowski, 421 U.S. 560, 95 S.Ct. 1851 (1975). That case involved review of the decisions of the

Secretary of Labor, with court authority resting on 5 U.S.C. § 702, the general review provision of the Administrative Procedure Act. However, it should be noted that section 702 states:

> Nothing herein ... affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground....

A substantial body of law has developed in the area of district court review of N. L.R.B. representational deicsions. As such, plaintiffs is bound by this law, and must therefore show that this case involves exceptional circumstances in order to secure review.

An examination of this case indicates that the required exceptional circumstances are not present. There is no statutory mandate requiring that house staff members be treated as employees

within the meaning of the Act. Plaintiffs cite various discussions in the legislative history to the effect that house staff members might not be supervisors within the meaning of the Act. However, in the end, Congress decided to leave such a determination to the Board for case-by-case factual decisions. S. Rep. No. 93-766, 93d Cong., 2d Sess. 6 (1974); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess. 7 (1974). There is nothing in the legislative history to indicate that Congress decided to treat the question of employee status for house staff members any differently. The question of the status of house staff members as employees or as students is primarily a factual and definitional determination of the type traditionally left to the discretion of the Board. See Amalgamated Clothing

Workers of America, AFL-CIO v. N.L.R.B., 420 F.2d 1296 (D.C. Cir. 1969). The Supreme Court in Boire v. Greyhound Corp., supra, indicated that the determination of employer status was a factual decision. 376 U.S. at 481, 84 S.Ct. at 899. It is difficult to distinguish the determination of employer status from the determination of employee status. Indeed, in the entire area of representational conflicts, the N.L.R.B. has developed an expertise to which this court must defer. Local 130, Internat'l Union of Elec., Radio & Machine Workers v. McCulloch, supra, 345 F.2d at 94. Even absent such expertise, this court may not upset the Board's choice between two fairly conflicting views, even though the court may have made a different choice originally. N.L.R.B. v. United Insurance Co. of America, 390 U.S.

256, 260, 88 S. Ct. 988, 991 (1968); Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 488, 71 S.Ct. 456, 465 (1951).

Absent a plain violation of a mandatory provision of the National Labor Relations Act, this court may not strike down the Board's order denying plaintiffs the status of labor organization. Regardless of the equities of the situation, this court can find no Congressional creation of a right of house staff members to be employees within the meaning of the Act. Without such a right, it is difficult to see how this case can fit into the narrow exception created by the Supreme Court in Kyne and Boire. Because of this, this case must be dismissed since this court has no jurisdiction to hear it.

An appropriate order accompanies this memorandum.

Thomas W. Flannery
United States District
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, ET AL., Plaintiffs, v. BETTY SOUTHARD MURPHY, ET AL., Defendants.	Civil Action No. 77-358 Filed Jan. 17, 1978 JAMES F. DAVEY, Clerk

O R D E R

This matter comes before the court on defendants' motion to dismiss or in the alternative for summary judgment, and on plaintiffs' cross-motion for summary judgment. Upon consideration of these motions, the memoranda submitted in support thereof and in opposition thereto, oral argument thereon, and for the reasons stated in the accompanying memorandum filed in this case this same day, it is, by the court, this 17th day of January,

1978,

ORDERED that plaintiffs' motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED that defendants' motion to dismiss or in the alternative for summary judgment be, and the same hereby is, granted; and it is further

ORDERED that this case be, and the same hereby is dismissed for want of jurisdiction.

Thomas W. Flannery
United States District
Judge

APPENDIX VI

Opinion and Mandate of the
Court of Appeals for the
Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1447 September Term, 1976

(Argued July 20, 1977 Decided September 1, 1977)

Docket No. 77-6075

NATIONAL LABOR RELATIONS BOARD,
Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS and NEW YORK STATE LABOR RELATIONS BOARD,
Defendants-Appellees.

Before:

MESKILL, *Circuit Judge* and NEAHER * and COFFRIN,** *District Judges.*

In this action, the National Labor Relations Board sought an injunction in the United States District Court for the Southern District of New York against the holding of a representation election under the auspices of the New York State Labor Relations Board. The NLRB moved for a preliminary injunction, and the defendant cross-moved for summary judgment. The district court, Charles E. Stewart, Jr., *J.*, granted the defendant's motion and the plaintiff appealed.

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* Hon. Edward R. Neaher of the Eastern District of New York, sitting by designation.

** Hon. Albert W. Coffrin of the District of Vermont, sitting by designation.

Reversed and remanded.

CARL L. TAYLOR, Associate General Counsel, National Labor Relations Board, Washington, D. C. (John S. Irving, General Counsel, John E. Higgins, Jr., Deputy General Counsel, Elliott Moore, Deputy Associate General Counsel, William Wachter, Assistant General Counsel for Special Litigation, Ruth E. Peters, Attorney, National Labor Relations Board, Washington, D. C., of counsel), *for Plaintiff-Appellant.*

MURRAY A. GORDON, New York, New York, *for Defendant-Appellee Committee of Interns and Residents.*

NORBERT M. PHILLIPPS, General Counsel, New York State Labor Relations Board, New York, New York, *for Defendant-Appellee New York State Labor Relations Board.*

MESKILL, *Circuit Judge:*

Prior to 1974, workers in voluntary, non-profit hospitals were excluded from coverage under federal labor law. In that year, Congress amended the National Labor Relations Act ("NLRA"), to include the labor-management relations of all non-profit health care institutions. Pub. L. No. 93-360, 88 Stat. 395 (1974) (amending 29 U.S.C. §§ 151 *et seq.* (1970)) ("the Health Care Amendments"). This case requires us to consider the preemptive effect of that change.

The Committee of Interns and Residents ("CIR") is a union of housestaff personnel. Its membership consists of doctors receiving post-graduate training in various hospitals. The three categories of its membership are interns, who have just completed medical school and are generally involved in a one-year program; residents, who are in a longer training program leading to certification in a medical specialty; and clinical fellows, who have completed residencies and are being trained in medical sub-specialties. From 1957 to 1974, CIR represented the housestaff at a number of hospitals in New York City under the jurisdiction of the New York State Labor Relations Board ("SLRB").

After the passage of the Health Care Amendments in 1974, a number of housestaff organizations similar to CIR filed election petitions with the NLRB. In March, 1976, the NLRB issued its first decision on these petitions, *Cedars-Sinai Medical Center,* 223 N.L.R.B. 251 (1976). That case held that while housestaff "possess[ed] certain employee characteristics," they are "primarily engaged in graduate educational training, and thus were students rather than employees. On this basis, the NLRB concluded that housestaff should not be given collective bargaining rights, and dismissed the petition.

Several weeks later, CIR filed an election petition with the SLRB. In July, 1976, the SLRB dismissed the petition on the ground that federal labor law, as expressed in *Cedars-Sinai,* had preempted the field. *In re Misericordia Hospital Medical Center,* 39 S.L.R.B. No. 32 (1976).

The CIR then brought suit in New York State Supreme Court to compel the SLRB to accept jurisdiction. That court ruled that the SLRB was free to accept jurisdiction over the labor relations of housestaff. *Committee of Interns and Residents* v. *New York State Labor Relations Board,* 88 Misc. 2d 502, 338 N.Y.S.2d 509 (Sup. Ct. N.Y. County 1976). The following month, the NLRB issued an

opinion concerning a housestaff union in which it explained that its intention in *Cedars-Sinai* had been to preempt the field. *Kansas City General Hospital,* 225 N.L.R.B. No. 14A, 93 LRRM 1362 (1976) ("Kansas City II"). In light of that decision, the state court vacated its prior decision. *Committee of Interns and Residents* v. *New York State Labor Relations Board,* 391 N.Y.S.2d 503, 505 (Sup. Ct. N.Y. County 1977).

In the interval between the two state court decisions, the NLRB began the action involved in the instant appeal. It sought to enjoin the holding of elections for housestaff officers under the aegis of the SLRB. *See NLRB* v. *Nash-Finch Co.,* 404 U.S. 138 (1971). The Board moved for a preliminary injunction, and the CIR cross-moved for summary judgment. Judge Stewart granted the CIR's motion, and denied any relief to the NLRB. 426 F.Supp. 438 (S.D.N.Y. 1977). We reverse and remand.

I

Federal preemption in the labor field is particularly broad. *See Motor Coach Employees* v. *Lockridge,* 403 U.S. 274 (1971); Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337 (1972). As the Supreme Court stated in *Garner* v. *Teamsters Union,* 346 U.S. 485 (1953):

> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered

> that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.

Id. at 490. The few exceptions to this pervasive federal regulation fall into a small number of categories. Congress has explicitly given the states jurisdiction over some labor matters, such as damage suits for unfair labor practices. 29 U.S.C. § 187(b). Suits for state-law torts committed during a labor dispute are traditionally matters of state concern, with only a peripheral federal interest. *Farmer* v. *United Brotherhood of Carpenters,* 45 U.S.L.W. 4263 (U.S. March 7, 1977). Finally, Congress has established clear procedures by which the NLRB may cede jurisdiction over labor disputes to appropriate state authorities. 29 U.S.C. §§ 160(a), 164(c). As discussed below, this case does not fall within any of these exceptions.[1]

II

In *Cedars-Sinai,* the NLRB concluded that housestaff, "although they possess certain employee characteristics, are primarily students." 223 N.L.R.B. at 251. Accordingly, the Board concluded that collective bargaining was not mandated by the NLRA or the Health Care Amendments, and that the extension of such rights to a student-teacher relationship was contrary to national labor policy.

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[1] At the time the NLRA was passed, it was thought that some labor disputes were beyond the scope of the commerce power. See 79 Cong. Rec. 9721 (1935) (exclusion of agricultural workers from definition of "employee" in NLRA). There is no contention here that Congress is without power to regulate the labor relations of interns and housestaff.

The district judge seized upon this distinction as the premise of a faulty syllogism. He concluded that, if housestaff were not "employees" as defined in § 2(3) of the NLRA, 29 U.S.C. § 152(3), then the CIR was not a "labor organization" as defined in § 2(5), 29 U.S.C. § 152(5). Since the NLRA applies only to "labor organizations," he concluded that the Board had waived its jurisdiction over housestaff. 426 F.Supp. at 449.[2]

The judgment of the district court is in conflict with the expressed intent both of Congress and the NLRB. In *Cedars-Sinai,* the NLRB stated that "it will effectuate the policies of the Act to assert jurisdiction." 223 N.L.R.B. at 251. Moreover, §§ 10(a) and 14(c) of the NLRA contain explicit mechanisms by which the NLRB can cede jurisdiction to state labor authorities. 29 U.S.C. §§ 160(a), 164(c).[3] Had the NLRB intended to cede jurisdiction to the SLRB, it would have been simple to do so. There is no reason to assume the NLRB did implicitly what it could have done expressly.

The NLRB made this clear in a subsequent decision. In *Kansas City II, supra,* the Board adhered to its decision that housestaff are not "employees," but held that the

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[2] We have recently criticized a similarly literal approach to the definitions contained in the NLRA. *Marriott In-Flite Servs.* v. *Local 504, Transport Workers of America,* 557 F.2d 295 (2d Cir. 1977). Even under the district court's analysis, the injunction should have issued. In *Kansas City II,* it is apparent that the NLRB concluded only that housestaff were not "primarily" employees, and not that they lacked all employee characteristics.

[3] These provisions are the exclusive means for ceding federal jurisdiction over activities covered by the NLRA. *Cf. Guss* v. *Utah Labor Board,* 353 U.S. 1 (1957).

hospital is nevertheless their "employer." The Board then stated:

> Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, inter alia, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in Cedars-Sinai, by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy.

93 L.R.R.M. at 1364 (footnote omitted).

Thus, it is clear from *Cedars-Sinai* and *Kansas City II* that the NLRB has not ceded jurisdiction over housestaff. Rather, the NLRB concluded that, although it has jurisdiction, it would be contrary to national policy to extend collective bargaining rights to housestaff because they "are primarily students."

There can be no doubt that the NLRB has power to prevent the states from granting collective bargaining rights to housestaff unions. In *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U.S. 767 (1947), the Supreme Court was faced with a closely analogous situation. At the time, the NLRB had concluded that supervisors were "employees" within the meaning of theAct. *Maryland Dry Dock Co.,* 49 N.L.R.B. 733 (1943). However, it had also concluded that, as a matter of national labor policy, unions of supervisors should not be given collective bargaining rights under the Act. The supervisors union filed election petitions with the SLRB, which accepted jurisdiction.

The Supreme Court reversed on preemption grounds. For the Court, Mr. Justice Jackson wrote:

> There was no administrative concession that the nature of these appellants' business put their employees beyond reach of federal authority. The Board several times entertained similar proceedings by other employees whose right rested on the same words of Congress. Neither did the National Board ever deny its own jurisdiction over petitions because they were by foremen. . . . It made clear that its refusal to designate foremen's bargaining units was a determination and an exercise of its discretion to determine that such units were not appropriate for bargaining purposes. . . . We cannot, therefore, deal with this as a case where federal power has been delegated but lies dormant and unexercised.
>
> Comparison of the State and Federal statutes will show that both governments have laid hold of the same relationship for regulation, and it involes the same employers and the same employees. Each has

> delegated to an administrative authority a wide discretion in applying this plan of regulation to specific cases, and they are governed by somewhat different standards. Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. . . . But the power to decide a matter can hardly be made dependent on the way it is decided.

330 U.S. at 775 (citations omitted). *Bethlehem Steel* controls here. The NLRB has asserted its jurisdiction and denied collective bargaining rights. Under *Bethlehem Steel*, State power has been ousted by agency action taken pursuant to a Congressional mandate.

III

The district judge attempted to distinguish *Bethlehem Steel* by focusing on the decision that housestaff are not employees.[4] In doing so, he misconceived the issue.

The inquiry is not a narrow or technical one, but rather whether Congress intended to occupy the field. The court must focus on the activity regulated and determine if it

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[4] Under the district court's analysis, SLRB jurisdiction would be outsted only if the NLRB found that (1) housestaff were employees and (2) that they should be denied collective bargaining rights because of their "primarily" student character. It is doubtful that an important aspect of national labor policy could turn upon such a highly technical distinction.

has been brought within the scope of federal power. Thus, in *Bethlehem Steel, supra,* the Court held:

> The federal board has jurisdiction of the *industry* in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in [*Packard Motor Car Co.* v. *NLRB,* 330 U.S. 485 (1947),] its power to decide whether these foremen may constitute themselves a bargaining unit. We do not believe this leaves room for the operation of the state authority asserted.

330 U.S. at 776 (emphasis added). The case at bar presents an identical situation. The federal regulation of labor law is so sweeping that it is inconceivable that the power of the states to act turns upon the way in which the agency decided a policy question. *Bethlehem Steel* explained that:

> [W]hen federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency.... However, when federal administrative regulation has been slight under a statute which potentially allows minute and multitudinous regulation of its subject . . . or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision awaits federal

> administrative regulation. . . . The states are in those case permitted to use their police power in the interval. . . . However, *the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.*

330 U.S. at 774 (emphasis added; citations omitted).

As the district court found, the unequivocal intent of Congress was to include all the labor relations of voluntary hospitals within the NLRA. 426 F.Supp. at 448.[5] Both the Senate and the House rejected amendments meant to ensure continued state jurisdiction in hospital matters. 120 Cong. Rec. 12946, 12995 (May 2, 1974); 16899-900, 16904-06, 16908-11 (May 30, 1974); 22575-76, 22581-82 (July 10, 1974); 22942-43 (July 11, 1974). This is in keeping with the ordinary rule of federal preemption in labor matters. Thus, Senators Mondale and Taft spoke in favor of the Health Care Amendments as a "national approach" to labor rela-

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[5] Even with the narrow issue focussed on by the district court—exclusion from the definition of "employee"—the underlying Congressional intent can lead to opposite results for preemption purposes. Thus, the exclusion of agricultural workers in § 2(3), 29 U.S.C. § 152(3), is the result of a Congressional decision not to exercise federal power over farm labor. *See* 79 Cong. Rec. 9721 (1935); 93 Cong. Rec. 6599 (1947). Therefore, the states may assert jurisdiction over the labor relations of farms and their employees. *See United Farm Workers Organizing Comm.* v. *Superior Court*, 4 Cal. 3d 556, 483 P.2d 1215, 94 Cal. Rptr. 2d 263 (1971) (In banc). However, the exclusion of supervisors in the same Section is the result of a Congressional determination that national labor policy requires that supervisors not be guaranteed collective bargaining rights. Accordingly, the Supreme Court has held that state jurisdiction over supervisors unions has been ousted by § 2(3). *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653 (1974).

tions in hospitals. 120 Cong. Rec. 12944-46 (May 2, 1974). Senator Williams, the chief sponsor of the Health Care Amendments in the Senate, stated:

> [T]he general purpose of the National Labor Relations Act, as interpreted by the Board and the courts, is to attempt to establish a uniform pattern of collective bargaining rules nationwide, without local variation.

120 Cong. Rec. 22575 (July 10, 1974). Similarly, the House sponsor, Representative Thompson, expressed the view that "it is apparent that the Federal law preempts any State law." 120 Cong. Rec. 22942 (July 10, 1974). Furthermore, the House rejected the "Quie Amendment," which would have ceded substantially less jurisdiction to the states than the CIR now claims for the SLRB. Finally, it is clear that Congress intended to include housestaff within the coverage of the Health Care Amendments. For example, in explaining Congress' rejection of amendments to the definition of "supervisor" in § 2(11), 29 U.S.C. § 152(11), the Senate Report stated:

> The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions.

S. Rep. No. 93-766, 1974 U. S. Code Cong. & Admin. News 3951. Thus, Congress rejected the amendment because it considered housestaff within the scope of the Health Care Amendments.

It is clear that Congress, if it wished, could exclude housestaff from the definition of "employee"; it could also deny them collective bargaining rights under state law. *Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653 (1974). Here, however, that decision has been made by the expert administrative agency to which Congress has delegated wide powers over national labor policy. It is thus clear that Congress has completely ousted state jurisdiction.

IV

A contrary holding would have a number of damaging effects. Primary among them would be the introduction of disparity in a labor policy designed to be national in scope. As the Supreme Court stated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959):

> We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.
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> • • •
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> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the

> administrative regulation. . . . The states are in those case permitted to use their police power in the interval. . . . However, *the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.*

330 U.S. at 774 (emphasis added; citations omitted).

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> activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting.

Id. at 242-43. If the NLRB erred in its treatment of housestaff unions, the solution is clearly not to create a patchwork of state-governed labor unions.[6]

There are already several areas of conflict and potential conflict between state and federal regulation. For example, the New York Labor Law provides for compulsory arbitration in labor disputes in voluntary hospitals. N.Y. Lab. Law §§ 716(2), (3), (4) (McKinney 1977), and the state courts may enjoin hospital strikes, *id.* § 716(9); on the other hand, the NLRA allows strikes and free collective bargaining, and hospital strikes come within the general prohibition of the Norris-LaGuardia Act. Thus, hospitals would be faced with contradictory duties and obligations if the CIR were to prevail. Similarly, the Health Care Amendments provide an elaborate mechanism for notice to be given by unions with grievances, 29 U.S.C. §§ 158(d), (g), while state law contains no such provisions.[7] Finally, a serious possibility

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[6] The CIR's argument, if accepted, would also create the possibility that housestaff in some states could not organize at all, while the CIR would be fully protected by New York law.

[7] While this legislative scheme might be better served if housestaff were organized, that is a policy question for the NLRB or Congress, and it has no relevance to the issue of preemption.

of conflict is raised if a jurisdictional dispute should arise between the CIR and a union recognized under the NLRA.[8]

The CIR has vigorously attacked the policy underlying *Cedars-Sinai*. However, the wisdom of the NLRB decision is not before us; it is before the United States District Court for the District of Columbia, where the CIR has brought a lawsuit seeking to overturn *Cedars-Sinai* as an abuse of discretion by the NLRB. *Physicians National House Staff Association* v. *Murphy*, Civ. No. 77-0358 (D.D.C., filed Mar. 3, 1977). In that action, the CIR contends that its members are "employees," and asks for an injunction to compel the NLRB to assume jurisdiction and extend collective bargaining rights. If the NLRB abused its discretion in *Cedars-Sinai*, those proceedings will correct the error. If the Board's action is upheld, however, the CIR may not seek to circumvent it by proceeding before the SLRB. The Health Care Amendments brought housestaff within national labor policy. Accordingly, the district court's conclusion that the SLRB had jurisdiction over housestaff was erroneous and cannot stand. In view of the State Supreme Court's decision in *Committee of Interns and Residents* v. *New York State Labor Board*, 391 N.Y.S.2d 503 (Sup. Ct. N.Y. County 1977), acquiescing in the NLRB's finding of preemption in *Kansas City II, supra*, there is doubt regarding whether this controversy has become moot or whether an injunction barring the holding of an election under the aegis of the SLRB is

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[8] This Court recently noted, in the context of a voluntary hospital, that "New York policy is fundamentally at odds with the National Labor Relations Act." *NLRB* v. *St. Luke's Hosp. Center*, 551 F.2d 476, 483 (2d Cir. 1976). The dispute there was over the related issue of a union's right, under a union security agreement, to represent a distinct class of professional employees who did not wish to be represented by a union of professional and technical workers. We held there that the agreement, valid under New York law, violated the NLRA.

necessary or appropriate. These matters have been neither briefed nor argued. We therefore leave them for consideration by the district court on remand.[9]

The grant of summary judgment is reversed. The cause is remanded to the district court for further proceedings not inconsistent with this opinion. Each party shall bear its own costs on appeal.

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[9] Justice Gellinoff dismissed the CIR's petition on January 6, 1977, and on January 20 he adhered to that ruling. On January 28, 1977, the NLRB prepared a motion for a stay of further proceedings in the instant action pending a final appellate determination of the state action. The NLRB argued that "[u]nless [the CIR's expected] appeal is successful, this Court will not need to rule on the Board's pleadings herein, since they are directed at a judgment which is now vacated." Unfortunately, this motion was not filed until February 3, 1977, the day after the district court filed its decision. Two days after the district court filed its decision, on February 4, the SLRB reversed its earlier decision, disregarded the decision of the State Court, and announced that, in view of the federal district court's decision, it would resume proceedings. Thus, if our view of the record is accurate, the district court's resolution of the merits on February 2 may have breathed new life into a controversy that was on the brink of mootness only weeks earlier. Such cases are inappropriate for resolution by the federal courts. *See DeFunis* v. *Odegaard*, 416 U.S. 312, 317 (1974) (student about to graduate). Indeed, this case appears to be a good example of a phenomenon of which federal district courts must be wary, namely, the generation, or re-generation, of what appears to be a constitutional "case" or "controversy" by means of the litigation process itself. *Cf. City of Hartford* v. *Glastonbury*, slip op. 5281, 5289-90 n.3 (2d Cir. Aug. 15, 1977) (en banc; plurality opinion); *id.* at 5293 (Kaufman, C.J., concurring). The NLRB's motion for a stay was ultimately denied on March 7, 1977, for the obvious reason that it had come too late.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the First day of November, one thousand nine hundred and seventy-seven.

HON. THOMAS J. MESKILL, *Circuit Judge,*
HON. EDWARD R. NEAHER, *District Judge,**
HON. ALBERT W. COFFRIN, *District Judge,***

77-6075

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, and
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

On September 21, 1977, this Court issued a decision reversing the district court and remanding for a determination whether an injunction is still necessary to prevent the New York State Labor Relations Board from asserting jurisdiction over the labor relations of interns, residents and clinical fellows. This Court now having been advised by the New York State Labor Relations Board that it will

not relinquish jurisdiction over the labor relations of interns, residents and clinical fellows without the entry of an injunction, and all parties to this case having jointly moved that this Court enter the following permanent injunction rather than remanding to the district court,

IT IS HEREBY ORDERED:

1. That the New York State Labor Relations Board is hereby permanently enjoined from asserting jurisdiction over the labor relations of interns, residents and/or clinical fellows; and

2. That the Committee of Interns and Residents is hereby permanently enjoined from attempting to cause the New York State Labor Relations Board to assert jurisdiction over the labor relations of interns, residents and/or clinical fellows.

THOMAS J. MESKILL
Thomas J. Meskill, U.S.C.J.

EDWARD R. NEAHER
Edward R. Neaher, U.S.D.J.

ALBERT W. COFFRIN
Albert W. Coffrin, U.S.D.J.

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* Of the Eastern District of New York, sitting by designation.

** Of the District of Vermont, sitting by designation.

APPENDIX VII

Opinion and Order of the District Court for the Southern District of New York (Stewart, J.)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

76 Civ. 5119

NATIONAL LABOR RELATIONS BOARD,

Plaintiff,

Against

COMMITTEE OF INTERNS AND RESIDENTS, AND THE NEW YORK STATE LABOR RELATIONS BOARD,

Defendants.

MEMORANDUM

STEWART, *District Judge:*

Plaintiff National Labor Relations Board ("NLRB" or "the Board") has brought this action in federal court seeking to enjoin defendant Committee of Interns and Residents ("CIR") from attempting to require co-defendant New York State Labor Relations Board ("SLRB") to assert jurisdiction over any of the unfair labor practice charges and the representation petition filed by the CIR against various voluntary, non-profit hospitals in the New York City area. The CIR is a labor organization whose members are physicians working in training programs as interns, residents and clinical fellows ("housestaff") in these hospitals. Plaintiff also seeks to enjoin defendant SLRB from considering, or in any way asserting jurisdiction over, these labor disputes. Plaintiff seeks this relief on the

ground that this area of labor relations has been preempted by the National Labor Relations Act, 29 U.S.C. §§ 151 *et. seq.* ("NLRA" or "the Act") and is within the exclusive jurisdiction of the NLRB. Plaintiff also seeks a declaratory judgment that these matters are preempted by the aforementioned federal statute.

Defendant CIR has cross-moved for summary judgment alleging that this court lacks jurisdiction over the subject matter of this action and that, on the merits, the NLRA has not preempted this area of labor relations. Defendant SLRB has taken no position, but has informed the Court that it will comply with the judgment of this Court or any other court of competent jurisdiction.[1]

FACTUAL BACKGROUND

The question presented by this action is whether house-staff physicians, working and training in voluntary non-profit hospitals in New York State, may be covered under the New York State Labor Relations Act, Labor Law § 700 *et seq.* (McKinney's 1965) ("SLRA"), or whether they are covered exclusively by the NLRA.

Section 701(12) of the Labor Law extends the coverage of the SLRA to "any person employed or permitted to work by or at a non-profitmaking hospital or residential care center." The SLRB has interpreted this to include

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[1] Albert Einstein College of Medicine and Misericordia Hospital Medical Center moved to intervene as plaintiffs under Rule 24(b) of the Federal Rules of Civil Procedure. On December 13, 1976, this Court denied the motion to intervene, but granted leave for the hospitals to appear as *amici curiae*. The Court has also allowed the Association of American Medical Colleges to file a brief as *amicus curiae*.

housestaff. *Long Island College Hospital,* 33 SLRB No. 32 (1967); *Brooklyn Eye and Ear Hosiptal,* 32 SLRB No. 21 (1966). For a considerable period of time, the SLRB and hosiptals have recognized the CIR (as provided by § 705 of the SLRA), as the exclusive bargaining representative of housestaff physicians in a substantial number of voluntary, non-profit hospitals in the New York City area. During this time, the CIR has negotiated collective bargaining agreements on behalf of its members with these hospitals.

Prior to 1974, there was no conflict between this coverage under the SLRA and the NLRA, because the NLRA had excluded from its definition of "employer" any "corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual" (repealed 29 U.S.C. § 152(2)). However, effective August 25, 1974, Congress deleted this exclusion from § 152(2), and extended the coverage of the NLRA to any "health care institution" which is defined as

> . . . any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged person . . . 29 U.S.C. § 152(14).

There appears to be no dispute that this amendment brought labor relations between voluntary, non-profit hospitals and their "employees" as defined in Section 2(3) within the jurisdiction of the NLRA. This by no means, though, disposes of the question of whether housestaff physicians are within the exclusive jurisdiction of the NLRA.

The NLRB first considered the situation of housestaff in *Cedars-Sinai Medical Center,* 223 NLRB No. 57, 91

LRRM 1398 (March 19, 1976), and concluded (with Member Fanning dissenting at length) that

> . . . interns, residents, and clinical fellows, although they possess certain employee characteristics, are primarily students. Accordingly . . . we conclude that the interns, residents and clinical fellows . . . are not "employees" within the meaning of Section 2(3) of the Act. *Id.* at 3.

In light of this conclusion, the NLRB found that the Cedars-Sinai Housestaff Association, which was comprised solely of housestaff physicians, was not a labor organization within the meaning of § 152(5) of the NLRA. The NLRB then dismissed the Association's petition to certify a bargaining unit of housestaff physicians on the ground that it presented "no question affecting commerce . . . concerning the representation of 'employees' of the Employer within the meaning . . . of the Act" 223 NLRB No. 57 at 8. This view was adhered to without modification in a number of subsequent cases involving housestaff in hospitals around the country.[2]

Following this decision, Misericordia Hospital Medical Center refused to recognize or bargain with the CIR, so the CIR petitioned the SLRB for certification based on the CIR's claim that it represented a majority of the housestaff at Misericordia. In addition, other hospitals, where the CIR had been recognized and certified as the exclusive bargaining representative for housestaff, also refused to bar-

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[2] *Wayne State University*, 226 NLRB No. 168 (1976); *Buffalo General Hospital*, 224 NLRB No. 17, 92 LRRM 1197 (1976); *St. Clare's Hospital*, 223 NLRB No. 163, 92 LRRM 1001 (1976); *University of Chicago*, 223 NLRB No. 154, 92 LRRM 1039 (1976); *St. Christopher's Hospital*, 223 NLRB No. 58, 91 LRRM 1417 (1976).

gain with the CIR, so the CIR filed with the SLRB unfair labor practice charge against these hospitals. In all these cases, the hospitals refused to recognize or bargain with the CIR because of the NLRB's ruling in *Cedars-Sinai*. Further, the hospitals objected to the proceedings before the SLRB on the ground that the 1974 health care amendments to the NLRA had preempted state regulation of labor relations in the health care field.

While these proceedings were pending before the SLRB, the NLRB issued its decision in *Kansas City General Hospital,* 225 NLRB No. 14 (June 24, 1976), in which it reiterated the *Cedars-Sinai* finding that housestaff physicians are not "employees" within the meaning of the NLRA, and concluded that the hospital there involved was

> . . . not an "employer" within the meaning of Section 2(2) of the Act for the purposes of any disputes relating to such personnel.

In the CIR proceedings before the SLRB, the jurisdictional issue was briefed, and on July 14, 1976, the SLRB dismissed the representation petition stating:

> The question of possible state jurisdiction here is certainly not free from doubt. Cogent arguments can be, and have been made on both sides of this issue. On balance, we have concluded that further processing of this matter before this Board is not waranted at this time. *Misericordia Hospital Medical Center,* 39 SLRB No. 32.

The unfair labor practice charges against the other hospitals were also dismissed for the same reason.

The CIR then commenced a number of Article 78 proceedings (New York CPLR § 7801 *et seq.* (McKinney's

1963)) in New York State Supreme Court asking the Court to vacate the SLRB's dismissals and order the SLRB to assert jurisdiction over the CIR's claims. Initially, the SLRB alone was named as defendant in these state court actions. However, a number of hospitals moved to intervene as defendants and did so by stipulation of the parties. Thereafter, the intervenors sought to remove several of the actions to federal court. Their petitions were denied on September 28, 1976 by Judge Brieant of this Court on the ground that the federal preemption question was not presented as part of the plaintiff's claim in state court, but only appeared as a defense, so there was no federal jurisdictional basis for removal. 28 U.S.C. § 1441.

Upon remand, Justice Gellinoff of the New York State Supreme Court vacated the SLRB's determinations dismissing the CIR's representation petition and unfair labor practice charges, and remanded them to the SLRB for further consideration. Justice Gellinoff concluded that, in light of 1) the NLRB's finding in *Cedars-Sinai* concerning the "employee" status of housestaff physicians, 2) its further determination in *Kansas City* that hospitals were not "employers" within the meaning of the NLRA for the purpose of disputes relating to housestaff, and 3) the absence of any language either in the NLRA or the Board's decision indicating the intention that "these vital members of the hospital's working staff should be bereft of any labor regulation at all,"

> . . . the jurisdiction of respondent State Board over disputes between petitioner and the intervening hospitals is unaffected by the 1974 amendments to the National Labor Relations Act, and therefore the Board retains the same jurisdiction it previously possessed. 93 LRRM 2540 (October 14, 1976).

In response to Justice Gellinoff's decision, the NLRB *sua sponte* reconsidered and revised its opinion in *Kansas City*. In its revised order of November 8, 1976, the Board (Member Fanning dissenting) announced that it would delete the finding in its original decision that the hospital was not an "employer" under the NLRA for the purposes of any disputes relating to housestaff, and that it relied simply on the *Cedars-Sinai* holding that housestaff are not "employees" under the NLRA as grounds for dismissing the union's petition. The Board then directly addressed the preemption question presented in the instant case, and concluded that there was federal preemption of labor relations in the health care field. The Board stated:

> Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, *inter alia*, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in *Cedars-Sinai*, by finding residents, interns and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put

> hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy. 225 NLRB No. 14A at 4-5 (footnotes omitted).

This action was commenced by the NLRB on November 16, 1977. The Court has been informed that there is no other federal action pending in which the NLRB's ruling on federal preemption in *Kansas City* is directly being reviewed (Transcript of December 10, 1976 hearing pp. 55-6).

An appeal from Justice Gellinoff's decision was taken by the defendant hospitals and was pending before the New York State Supreme Court, Appellate Division, when this federal action was filed. However, in light of the Board's revised decision in *Kansas City,* several of the hospitals also moved to reargue before Justice Gellinoff. On January 6, 1977, the motion was granted and Justice Gellinoff vacated his previous decision and dismissed the CIR's petitions on the ground that he was bound by the Board's subsequent ruling on preemption. On January 20, 1977 Justice Gellinoff denied the CIR's request that he reconsider his January 6, 1977 ruling. The Court has been informed that the CIR has filed a notice of appeal from the dismissal, and that the Appellate Division has provided for an expedited briefing schedule and oral argument in early March (January 26, 1977 letter of Daniel Riesel representing *amicus* Albert Einstein College of Medicine).

JURISDICTION

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1337 as the action arises under the NLRA, 29 U.S.C. § 151 *et seq.* The CIR has asserted, however, that

this Court lacks subject matter jurisdiction on the grounds that 28 U.S.C. § 2283 bars this Court from granting either the injunctive or declaratory relief sought and that no exception to § 2283 is applicable here. The CIR further contends that this Court is barred by principles of federalism and equity from granting the injunctive relief sought.

First, we agree that the relief sought in this case does fall within the prohibition of § 2283 which states:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Here, defendant CIR initiated state court proceedings, long before this case was filed, in which it sought review of the SLRB's dismissal of the CIR's representative petition and unfair labor practice charges and a determination that the SLRB did have jurisdiction over the CIR's labor disputes with the hospitals. These state court proceedings are still pending—at this point at the appellate level—where the trial court's dismissal of the CIR's petitions is under review.

The direct impact of this court issuing the injunction sought would be to restrain the CIR from continuing to assert its rights in these state court proceedings. This puts the injunctive relief sought within the structures of § 2283. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers,* 398 U.S. 281, 287 (1970); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 309 U.S. 4, 9 (1940). Section 2283 applies as well to the declaratory relief sought. *Thiokol Chemical Corp.* v. *Burlington Industries,* 448 F.2d 1328 (3d Cir.) *cert. denied* 404 U.S. 1019

(1971); *accord, Samuels* v. *Mackell,* 401 U.S. 66 (1971); *Gajon Bar & Grill* v. *Kelly,* 508 F.2d 1317 (2d Cir. 1974).

There are a number of exceptions to the prohibition set forth in § 2283, three of which appear in the statute itself. None of these is urged by the parties as having application here. However, plaintiff contends that the exception developed in *NLRB* v. *Nash-Finch Co.,* 404 U.S. 138 (1971) does apply in this case. The CIR disagrees.

In *Nash-Finch,* the Supreme Court held that the NLRB had "implied authority . . . in spite of the command of § 2283, to enjoin state action where its federal power preempts the field" (404 U.S. at 144).

In *Nash-Finch,* as here, no proceedings were pending before the Board involving the activities which the Board sought to enjoin the state court from regulating. Instead, the Board's claim there, as here, was based on its general assertion that the conduct which the state sought to regulate was governed exclusively by the NLRA. In a procedural context, then, very similar to that present here, the Supreme Court in *Nash-Finch* found that the Board had the implied authority to seek injunctive relief against preempted state action.

The CIR claims that the *Nash-Finch* exception of § 2283, however, should not apply in the instant case because here the existence of federal preemption is the heart of the controversy between the parties, while in *Nash-Finch,* according to the CIR, preemption was "posited and apparently not contested" (CIR Memorandum p. 15). While Justice Douglas writing for the majority, did find in *Nash-Finch* that "the exclusiveness of the federal domain is clear," (404 U.S. at 147) we do not think that the Court's holding depended on the preemption issue being uncontested. In fact, judging from comments made by Justice White in his dissent, this issue was not uncontested (*Id.* at 154-156).

The Supreme Court's analysis in *Nash-Finch* began with its finding that the purpose of the NLRA

> . . . was to obtain "uniform application" of its substantive rules and to avoid the diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies." *Id.* at 144.

The Court recognized the special position of the NLRB, as "the sole protector of the 'national interest' " (*Id.* at 145), as defined by the NLRA, and concluded that an exception to § 2283 existed for the NLRB when it was acting in its capacity as "protector" of the national interest, and seeking to protect federal rights and policies from improper regulation by the state. The § 2283 exception was proper under these circumstances, because:

> The purpose of § 2283 was to avoid unseemly conflict between the state and the federal courts where the litigants were private persons, not to hamstring the Federal Government and its agencies in the use of federal courts to protect federal rights. We can no more conclude here than in *Leiter* [*Minerals, Inc.* v. *United States*, 352 U.S. 221 (1957)] that a general statute, limiting the power of federal courts to issue injunctions, had as its purpose the frustration of federal systems of regulation. The frustration of superior federal interests by the general language of § 2283 cannot reasonably be imputed. *Id.* at 145 (citations omitted).

We think this rationale applies as much where federal preemption may have been conceded as where it is contested by the parties, and ultimately found by the court. Once the court determines that the Board's preemption

claim is not frivolous (as it clearly is not here), it may entertain the Board's action seeking injunctive relief under the *Nash-Finch* exception to § 2283's jurisdiction bar.[3]

Accordingly, we find that the exception to § 2283 articulated in *Nash-Finch* applies in the instant case, and this court has jurisdiction over the subject matter of this action.

The CIR further argues that we should decline to exercise our jurisdiction because "considerations of federalism, comity and the adequacy of state remedies mandate equitable restraint" (CIR Memorandum p. 16).

The Supreme Court has indicated that, even where there is an exception to the anti-injunction statute, the principles of equity, comity and federalism must still be considered by a federal court when asked to enjoin a state court proceeding. *Mitchum* v. *Foster,* 407 U.S. 225 (1972). The weight which these elements must be given when the state proceeding is criminal has been extensively analyzed by the Court in *Younger* v. *Harris,* 401 U.S. 37 (1971) and its companion cases. Concerning the application of the *Younger* doctrine to state civil cases, Justice Stewart, concurring in *Younger,* stated:

> Courts of equity have traditionally shown greater reluctance to intervene in criminal prosecutions than

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[3] The concerns expressed by Justice White, dissenting in *Nash-Finch,* do not militate against this conclusion. He urged that if, contrary to his view, the Board did have power to seek an injunction to prevent state interference in activities preempted by federal law, it should not be able to obtain this relief simply by "the mere conclusory allegation that such rights are 'arguably' protected" (*Id.* at 154), but should be entitled to the relief only if it "persuades a federal court that the state decree is actually interfering with rights protected by federal law" (*Id.* at 156). Thus even the dissent envisioned the jurisdictional doctrine expressed in *Nash-Finch* as applying where the preemption issue was not initially settled, and simply argued that the higher standard of proof was necessary in order for the court to grant the injunctive relief sought.

> in civil cases. . . . The offense to state interests is likely to be less in a civil proceeding. A State's decision to classify conduct as criminal provides some indication of the importance it has ascribed to prompt and unencumbered enforcement of its law. By contrast, the State might not even be a party in a proceeding under a civil statute. 401 U.S. at 55 n. 2 (citations omitted).

In *Lynch* v. *Household Finance Corp.*, 405 U.S. 538 (1972), Justices White and Blackmun and Chief Justice Burger indicated, in a dissent addressing a question not reached by the majority, that they viewed the *Younger* considerations as "equally applicable where state civil litigation is in progress" (*Id.* at 561). However, most recently in *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975), the Court, including the three dissenters in *Lynch*, specifically declined to make a "general pronouncement upon the applicability of *Younger* to all civil litigation" (*Id.* at 607). In *Huffman*, the federal court had been asked to enjoin a pending state civil nuisance proceeding which had been brought by the state. The Supreme Court emphasized the fact that the state had brought the state court action and that that action was "both in aid of and closely related to criminal statutes" (*Id.* at 604). Under these circumstances, the Court concluded that to disrupt the state action would interfere with the "State's efforts to protect the very interests which underlie its criminal law" (*Id.* at 605), and that the affront to the state was just as great as it would be if the state proceeding had been criminal. Thus the Court held that the principles of federalism and comity expressed in *Younger* applied and dictated that the federal court decline to exercise its jurisdiction.

In the instant case, not only is there no state criminal proceeding involved, but the pending state civil action was brought by a private party on the basis of the state labor statutes, and can in no way be considered to be either "in aid of" or "closely related to" any criminal statute. Thus we conclude that the *Younger* principles, even as extended by *Huffman*, do not apply with such force in this case. *Vail* v. *Quinlan*, 406 F.Supp. 951 (S.D.N.Y.), *prob. juris. noted sub nom Juidice* v. *Vail*, — U.S. —, 96 S.Ct. 3164 (1976).

To determine whether the principles of comity and federalism should cause us to decline to assert jurisdiction here, we must evaluate the competing state and federal interests, in light of the ground asserted in support of intervention in the state proceedings. *Perez* v. *Ledesma*, 401 U.S. 82 (1971). Here, plaintiff asserts a claim of federal preemption. Recently, a three-judge court in *Doe* v. *Maher*, 414 F.Supp. 1368 (D. Conn. 1976), appeal docketed, 45 U.S.L.W. 3451 (December 24, 1976), analyzed the considerations of comity and federalism presented when a federal plaintiff asserts a preemption, rather than a constitutional, claim as the ground for federal intervention in state proceedings and concluded that "traditional notions of federal-state relations, rather than requiring abstention, impel this court to intervene" (*Id.* at 1374).

The *Maher* court indicated that, while the doctrines of comity and federalism counsel a federal court to give proper deference to the independent sovereignty of the individual states, this deference should be tempered by recognition of the particular areas of expertize of the federal and state courts. A claim of preemption requires the court to determine, in the absence of specific direction, the Congressional intent behind a particular statute. This is a task of federal

statutory interpretation. Because the federal courts have primary competence in deciding questions of federal law, preemption thus presents an issue which is within the sphere of special federal judicial competence. It would be inappropriate for a federal court to decline jurisdiction in these circumstances.

The court in *Maher* also determined that the federalism interest of avoiding any interference with pending state court proceedings was not compelling where the federal injunction was based on preemption, rather than constitutional, grounds. In the case of preemption, the intrusion flowed from and expressed a Congressional determination that the area was not within state power. Thus, as the court stated:

> [a] finding of preemption . . . is a finding that the intrusion has already occurred . . . it would be a finding that for reasons of national policy Congress had intended that the pending state court actions should not have been instituted. It would be a finding concerning the validity of the proceeding itself, not just concerning the constitutionality of the particular statute or its particular application. While this would clearly be an intrusion into a legitimate sphere of state interest, it would be an intrusion accomplished at the direction of Congress, and one which is clearly within Congress' power to direct. 414 F.Supp. at 1375.

An additional factor militates against declining jurisdiction in the instant case: here the NLRB is asserting the claim of federal preemption. We think that the same considerations which caused the Supreme Court to develop an exception to § 2203 for the federal government and its

agencies in *Leiter* and *Nash-Finch,* and to conclude that for these federal entities, "access to federal courts is 'preferable in the context of healthy federal-state relations' " (404 U.S. at 147 citing *Leiter* at 226), support the exercise of federal jurisdiction here.

Thus we have concluded that the concerns addressed by the principles of comity and federalism weigh in favor of, not against, our exercising jurisdiction.

Nor does the CIR's assertion that plaintiff has an adequate remedy in the state courts change this balance. It would appear that the pending state proceedings offer adequate opportunity for the NLRB to raise fully its preemption claim. However, as discussed above, a finding that federal law preempts application of any state regulation amounts to a finding that the state action should not have been brought. The NLRB is not a party to the state actions and specifically declined to join them, though invited to by the CIR (Defendant CIR's Answer, Exhibits 23 and 24). Rather than finding this choice improper, we think it would be somewhat anomalous to require the NLRB to submit to the jurisdiction of a state court when the basis of its claim is that the state does not have any jurisdiction over the subject matter.

Further, we think that the preference for a federal forum expressed in *Nash-Finch* weighs strongly against our requiring the NLRB to seek its remedy in state court. Indeed, in *Nash-Finch,* the Court did not so require. As Justice White observed (dissenting):

> Rather than allowing the union to appeal the injunction through the state court system, and to this Court if necessary, as the union would ordinarily have to do, *Atlantic Coast Line R. Co.* v. *Brotherhood of Locomotive Engineers, supra,* the Court to-

> day permits the Board to short-circuit that process by securing a federal injunction, solely upon allegations that the conduct of the union was arguably protected under federal law and was within the exclusive jurisdiction of the NLRB. 404 U.S. at 154-155.

We think here that it is neither necessary nor proper for us to require the NLRB to first litigate its preemption claim in the state courts, and we will not decline jurisdiction because of the CIR's claim that plaintiff has an adequate state court remedy.

Accordingly, we do not find that the considerations of federalism and comity or the adequacy of state remedies require that we decline to exercise our jurisdiction, and we will now consider the merits of the plaintiff's claim.

PREEMPTION

Preemption of state regulation occurs where there is a clear manifestation of Congressional intent to occupy the field and supersede the state's exercise of power. *New York Department of Social Services* v. *Dublino,* 413 U.S. 405 (1973); *Schwartz* v. *Texas,* 344 U.S. 199 (1952). Divining this intent from the provisions of the National Labor Relations Act has involved the courts in a considerable stream of litigation since the passage of the Act. In the course of this process of interpretation, the Supreme Court has identified a number of different factual patterns wherein federal pereemption is indicated. For the purposes of this case, we have found it useful to analyze these cases by dividing them into three categories.

The first consists of cases where the Board has determined that the activity involved is protected by § 7 (Rights

of Employees), or prohibited by § 8 (Unfair Labor Practices), of the Act, or where, even though the Board has not determined the status of the conduct, it may fairly be assumed to be, or is arguably, subject to §§ 7 or 8. Here the Court has consistently found preemption necessary to policy as expressed by the provisions of §§ 7 and 8. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-245 (1959); *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971); *Garner* v. *Teamsters, Chauffers and Helpers Local Union No. 776*, 346 U.S. 485 (1953); *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U.S. 18 (1949).

The Act has also been interpreted to preempt state regulation in areas where the Board has declined to exercise its jurisdiction on the ground that it would not effectuate the policies of the Act to do so. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767 (1947).

The third category of cases in which the Court has found federal preemption of state regulation is where the activity is neither protected nor prohibited by the Act, and the national labor policy has been interpreted to require that the activity should be wholly unregulated and left to the free play of economic forces. *Local 20, Teamsters, Chauffers & Helpers Union* v. *Morton*, 377 U.S. 252 (1964); *Lodge 76, International Association of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Commission*, — U.S. —, 96 S.Ct. 2548 (1976). *See, NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971). A variation within this third line of cases, presenting a limited aspect of preemption, are a number of cases in which the Court found the National labor policy to dictate that the labor relations of particular entities not be subject to the provisions of the

NLRA, or any comparable state labor statutes, but not to preclude application of all state laws. *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Association,* 382 U.S. 181 (1965); *cf. Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653 (1974).

I

We first turn to the legislative history of the 1974 health care amendments (P.L. 93-360, 88 Stat. 395) to see if it indicates that Congress contemplated the preemption of state regulation of labor relations covered by these amendments. We conclude that such was the intent of Congress. *Accord, Methodist Hospital of Brooklyn* v. *New York State Labor Relations Board,* 382 F.Supp. 459 (S.D.N.Y. 1974); *State of New York* v. *Local 144, Hotel, Nursing Home and Allied Health Services Union,* 92 LRRM 2357 (S.D.N.Y. 1976); *North Shore University Hospital* v. *Levine,* 90 LRRM 2529 (E.D.N.Y. 1975).

This intention emerges distinctly from the remarks made in both the House and Senate during discussions of the 1974 amendments and from the fact that a proposal that the bill be amended specifically to insure the continuing vitality of state labor laws and prevent their preemption was rejected by both houses. 120 Cong. Rec. 12946, 12995 (May 2, 1974); 16899-900, 16904-906, 16908-911 (May 30, 1974); 22575-576, 22581-582 (July 10, 1974); 22942-943 (July 11, 1974). The remarks recommending that the NLRB favorably entertain the possibility of ceding jurisdiction back to the states under § 10(a)[4] of the Act, do not suggest a con-

[4] Section 10(a) provides in pertinent part: "That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry . . . even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

trary Congressional understanding as to the preemptive impact of the 1974 amendments. 120 Cong. Rec. 22576, 22581-582 (July 10, 1974); 22942-943 (July 11, 1974). Indeed, such remarks were premised on the recognition that state regulation would be preempted and thus that § 10(a) ceding would be the only way that a state could continue to exercise jurisdiction.

Thus we find that Congress intended, by the 1974 amendments, to preempt from state regulation the labor relations of employees of private, voluntary, non-profit hospital employers such as those against whom the CIR filed representation petitions and unfair labor practice charges with the SLRB. Accordingly, if housestaff were employees of such hospitals, all labor disputes between these entities would be within the exclusive jurisdiction of the NLRB. However, the instant action does not present us with this easy case and thus this general expression of Congressional intent is not dispositive.

Here, the Board has ruled that housestaff are not "employees" as defined in the Act, but "primarily students."[5] *Cedars-Sinai Medical Center,* 223 NLRB No. 57 at 3, 8 (1976). It is properly within the power and duties of the Board, as the agency entrusted with the primary responsibility of administering and interpreting the Act, to make this initial determinaton as to the "employee" status of housestaff. *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U.S. 485 (1947); *Bethlehem Steel, supra.* Indeed, this determination, and a finding that the employer is engaged in activity affecting interstate commerce, are threshold jurisdictional questions which the Board must always resolve before it may entertain any

[5] By so holding the Board rejected the contention that housestaff are "professional employees" as defined in Section 2(12) of the Act.

labor dispute presented to it. As a consequence of its finding in *Cedars-Sinai* that housestaff are not "employees," the Board was required to dismiss the union's representation petition because "no question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act" (*Id.* at 3, 8).

The role of this Court is not to review this original determination by the Board, and we therefore express no opinion as to its soundness. The controvery in this case concerns the issue of whether or not defendant CIR may request the SLRB to assert jurisdiction over the representation petition, and unfair labor practice charges which the CIR filed against the hospitals. The question before us, then, is whether, given the Board's ruling that housestaff are not "employees" within the NLRA, the Board's further ruling in *Kansas City* that the labor relations of housestaff are preempted by the 1974 health care amendments from all state regulation is correct.

Since the Board has found that housestaff are not "employees" within the Act, it follows from the interlocking definition set forth in § 2(5),[6] that their union is not a "labor organization" under the Act as the Board so held in *Cedars-Sinai.* Section 7 delineates certain rights and protections which the Act affords to "employees." Section 8 prohibits an employer from engaging in certain kinds of activity with regard to "employees" or a "labor organization" and provides parallel prohibitions against certain

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[6] Section 2(5) states that: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

activity by a "labor organization." Section 9 regulates the procedures whereby "employees" designate or elect their representative for purposes of collective bargaining. Therefore, by their terms, §§ 7, 8 and 9 cannot apply to protect or prohibit any actions at all taken by housestaff or their union, or any actions taken by an employer with regard to housestaff or their union. *Cf. Beasley* and *Hanna Mining, supra.*

Accordingly, we conclude that the general Congressional intent to preempt state regulation of labor relations covered by the 1974 health care amendments cannot encompass the labor relations of housestaff and that the preemption doctrine articulated in *Garmon* and *Lockridge, supra,* does not apply.

II

The second theory of preemption discussed earlier was delineated in *Bethlehem Steel, supra,* where the Board had ruled that foremen were "employees" within the definition of the Act and their employer was engaged in interstate commerce; thus the Board had jurisdiction over the representation petition filed by the foremen's union. However, the Board declined to exercise its jurisdiction on the ground that it would not effectuate the policies of the Act to do so. Under these circumstances, the Supreme Court found that for the state to apply its labor laws, and recognize a bargaining unit of foremen, would conflict with the federal labor policy that such units were inappropriate, and thus the Court held state regulation preempted. Plaintiff and *amici* urge this court to apply the rationale of *Bethlehem Steel* here.

The problem we find with doing so in this case is that one of the elements vital to *Bethlehem Steel* is missing. *Bethlehem Steel* was premised on the fact that the Board

had jurisdiction over the foremen's petition. As the Court stated:

> The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general. It asserts, and rightfully so, under our decision in the *Packard* case, *supra*, its power to decide whether these foremen may constitute themselves a bargaining unit. 330 U.S. at 776.

The clear import of this passage is that without the Board's ruling that foremen were "employees" within § 2(3)—a ruling upheld by the Supreme Court in *Packard, supra*—the Board could not "rightfully" assert power over the union's petition. This conclusion flows directly from the language of the NLRA which, except for the specific provision in § 14(a) concerning "supervisors"[7] nowhere applies to the labor relations of *non-employees*, whether or not they happen to provide their services for entities that are "employers" under the Act.[8] The scope of the Board's

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[7] Section 2(3) states that the "term 'employee' . . . shall not include . . . any individual employer as a supervisor." However, Section 14(a) provides that "[n]othing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

[8] The Board in its original decision in *Kansas City General Hospital*, 225 NLRB No. 14 (1976), followed the logical consequence of its *Cedars-Sinai* ruling even one step further and found that the hospital was "not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to [housestaff]."

power to interpret and administer the Act must necessarily be limited by the boundaries of the Act itself. Therefore, once the Board determined that housestaff are not "employees," it had no power to exercise over them and had no jurisdiction over them which it would decline to assert. Accordingly, we conclude that *Bethlehem Steel* does not control here.

III

Thus it is the preemption principle enunciated in the third group of cases noted earlier that could most properly apply here, where housestaff and their labor relations activities are, because of the Board's ruling, neither protected nor prohibited by the Act. The crucial question, then, is whether national labor policy requires that housestaff labor relations be free from all regulation, state as well as federal, and left to the unrestrained interplay of economic forces in the marketplace. *Teamsters* v. *Morton, Machinists* v. *WERC, supra.*

We first consider whether there is anything in the legislative history of P.L. 93-360 which indicates that Congress specifically intended that housestaff should not be regulated by either the NLRA or any state labor laws.

The general purpose behind the enactment of the health care amendments to the NLRA was to "insure the continuity of health care to the community and the care and well being of patients" (Senate Report No. 93-766 at 4, 93d Cong. 2d Sess. (1974)). To this end, the previous exemption of non-profit health care institutions was deleted from § 2(2), on the ground that "the exemption of non-profit hospitals from the Act had resulted in numerous instances of recognition strikes and picketing" (*Id.* at 3). It was felt that "[c]overage under the Act should completely eliminate the need for any such activities, since the proced-

ures of the Act will be available to resolve organizational and recognition disputes" (*Id.*). These special procedures under the Act include requirements that the union give 10-day notice before striking (new § 8(g)), and that the union and employer participate in mediation at the direction of the Federal Mediation and Conciliation Service (amended § 8(d)). Thus the general national labor policy expressed by Congress in enacting P.L. 93-360 was that the labor relations of non-profit health care institutions should no longer be left to "the free play of economic forces" (*Nash-Finch*, 404 U.S. at 144), but should be subject to regulation uniform federal regulation, in particular.

The only specific position which Congress took on the question of whether or not housestaff would be included in this plan of national labor regulation, was in response to the suggestion that they might be considered "supervisors," and thus be excluded from the Act. On this issue, Congress indicated that housestaff would *not* come within the definition of "supervisor" in § 2(11). Consequently, a special provision to insure that housestaff would not be excluded from the Act was unnecessary. The Senate Report stated:

> [v]arious organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor." The Committee has studied this definition with particular reference to health care professionals, such as registered nurses, interns, residents, fellows, and salaried physicians and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other

> employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations. S. Report No. 93-766 at 6.

This resolution of the one possible exclusion problem that arose suggests that Congress, at the time it was considering the health care amendments, did not have any policy that housestaff should not be covered by the Act or any other body of labor law. This interpretation of Congressional intent is further supported by the language used in this passage which indicates that Congress may well have thought that housestaff would be classified as "professional employees," as defined in § 2(12) of the Act.

Thus, what evidence there is of Congressional intent as to regulation of housestaff under the NLRA points toward their inclusion in the general national labor policy of regulating labor relations in health care institutions. We certainly have found no clear expression in the legislative history of P.L. 93-360 of a contrary national labor policy that housestaff should be unregulated by both the NLRA and any state labor laws.

We next consider the NLRB's ruling on preemption. It appears that the Board's decision, *sua sponte*, to reconsider its order in *Kansas City* and address the preemption question was somewhat precipitate. As Chairman Murphy and Member Penello noted in the revised order:

> [t]he preemption issue was never raised or litigated by the parties nor was it considered or even con-

templated by us in reaching our decision [originally]. Now that the New York Supreme Court has attempted to broaden the original Decision and Order to encompass the preemption issue, we have decided to join our colleagues in deleting the quoted language [that the hospital was "not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to (housestaff)] in this Revised Decision and Order to avoid even the slightest impression that a majority of this Board believes that state jurisdiction over residents, interns, and fellows has not been preempted by the Federal statute.

In addition, however, Chairman Murphy notes that it was not her intent at the time this case was decided that the Board was preempting the field insofar as Federal labor policy might apply to interns and residents, but she has now been persuaded that this was the effect of the 4 to 1 majority holding herein. 225 NLRB No. 14A at 4, fn. 6.

The rationale for its finding of preemption was expressed by the Board (Member Fanning dissenting) as follows:

It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, *inter alia*, were not supervisors within the meaning of the Act, but left the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion. Having exercised its discretion in *Cedars-Sinai*, by finding residents, interns, and fel-

> lows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy. 225 NLRB No. 14A at 4-5.

While this explanation does not amplify the Board's ruling on preemption as much as we might have liked, we think it clear enough that the Board reached its decision on the basis of its conclusion that it is the national labor policy that persons who are "primarily students" should not be afforded collective bargaining rights under the Act and should be unregulated by all labor laws, state and federal.

The Board, in the course of ruling on representation petitions by unions seeking to represent employees at educational institutions, has considered, in a number of cases, the propriety of including students working for the institutions in the petitioned-for bargaining units. *Leland Stanford Junior University,* 214 NLRB No. 82 (1974); *Barnard College,* 204 NLRB No. 155 (1973); *Cornell University,* 202 NLRB No. 41 (1973); *Georgetown University,* 200 NLRB No. 14 (1972); *College of Pharmaceutical Sciences in the City of New York,* 197 NLRB No. 142 (1972); *Adelphi University,* 195 NLRB No. 107 (1972).

In *Leland Stanford,* the Board ruled, as it did in *Cedars-Sinai,* that the graduate research assistants whose union sought certification of a collective bargaining unit were not "employees" within the meaning of § 2(2), and dismissed the union's petition. However, in all the other cases, the Board did not rule that students *per se* were not "employees" under the Act, but simply found that the students

—referred to by the Board as "student employees," or "primarily students" or "not primarily employees"[9]—did not have a sufficient community of interest with the other, regular employees so as to make inclusion of the student workers in the petitioned-for units appropriate.

In the majority of these cases, the Board seems to have acted on the principle that student workers are covered by the Act, and to have simply determined that they should not be part of the particular unit that was petitioned-for, and *not* that they should or could never be part of any collective bargaining unit. Indeed the Board in *Cedars-Sinai* appeared to have explicitly recognized and accepted this principle, stating:

> [w]e are aware that the Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students . . . we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act. 223 NLRB No. 57 at 9.

Accordingly, we do not discern in these cases the expression of a uniform national labor policy that workers who are also students or "primarily students" should be denied collective bargaining rights.

We also have not been directed to, nor have we found, any expression of a national labor policy that students be wholly unregulated in either the Act itself or its legislative history. Nor have plaintiff or *amici* been able to articulate the rationale which would support such a national policy vis-à-vis students. The impact which collective bargaining might have on the "student-teacher relationship" and the educational experience, which *amicus* Association of Amer-

[9] In *Cedars-Sinai*, the Board found that housestaff, "although they possess certain employee characteristics, are primarily students." 223 NLRB No. 57 at 3.

ican Medical Colleges urges in support of the Board's ruling on preemption (AAMC Brief at 9-12), may be a legitimate concern of education policymakers, but this is surely beyond the scope of any national *labor* policy. Further, the student-teacher relationship is not analogous to the supervisor-employer relationship, and thus we do not find the policies which led to the statutory exclusion of "supervisors" from the Act—that their inclusion would improperly taint the collective bargaining process both for other employees and the employer, and would upset the balance of power—applicable here. For a fuller discussion of these policies see *Beasley*, 416 U.S. at 659-662; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974); *Packard*, 300 U.S. at 496-500 (Douglas, J. dissenting).

Thus, although we are mindful of the deference we owe to the Board's formulations as the agency entrusted with the primary function of interpreting and administering the NLRA, we cannot agree that there is a uniform national labor policy that persons who are "primarily students" should not only be denied collective bargaining rights under the Act, but be left unregulated by any labor law, state as well as federal.

Accordingly, because we have not been able to find any national labor policy that requires that the labor relations of housestaff be totally unregulated and left to the free play of economic forces, we find that the preemption doctrine enunciated in *Teamsters* v. *Morton*, *Machinists* v. *WERC* or *Hanna Mining*, all *supra*, does not apply in the instant case.

IV

Finally, we recognize that the provisions of the New York SLRA pertaining to hospital workers are not identical to the provisions of the NLRA health care amendments. Sections 713 and 716 of the Labor Law (McKinney's 1965) prohibit strikes and lockouts and require binding arbitration of any grievance or dispute in nonprofitmaking hospitals. These requirements are more restrictive than the strike and arbitration provisions set forth in the NLRA § 8(d) and (g) (see discussion *supra* at 26). However, Congress has expressed particular concern over the disruptive effect on patient care of strikes in health care institutions, and has evidenced a basic intent that the labor relations of these institutions be regulated in order to prevent such disruption. The occurence, last fall, of recognitional strikes by the CIR in response to the hospitals' refusals to bargain with the CIR because of the Board's ruling in *Cedars-Sinai* and the hospitals' contention that state regulation had been preempted (Gluckman Affidavit of November 30, 1976 at 2-6), is exactly the evil sought to be removed by the enactment of the 1974 amendments. Thus we think that allowing the possibility of state regulation of housestaff is more in harmony with, and in furtherance of, the national labor policy and Congressional intent relating to health care institutions, than is foreclosing any state regulation of housestaff labor relations.

To summarize, our jurisdiction has been properly invoked under 28 U.S.C. § 1337 and we may exercise this jurisdiction under the *Nash-Finch* exception to the prohibition of 18 U.S.C. § 2283. Because the NLRB's ruling that housestaff are not "employees" under the NLRA, the labor

relations of housestaff physicians are not subject to the provisions of the Act and are not within the jurisdiction of the Board. We conclude that the NLRA does not preempt the exercise of state power over the labor relations of housestaff because we find that there is no national labor policy which requires that housestaff be unregulated by all bodies of labor law and controlled only by the free play of economic forces. Accordingly, we deny plaintiff's motion for a preliminary injunction and we grant defendant CIR's motion for summary judgment. This memorandum decision shall constitute the Court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

So ORDERED.

/s/ CHARLES STEWART
United States District Judg

Dated: New York, N. Y.
January 31, 1977.

Order

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

76 Civ. 5119

———o———

NATIONAL LABOR RELATIONS BOARD,

Plaintiff,

against

COMMITTEE OF INTERNS AND RESIDENTS and THE NEW YORK STATE LABOR RELATIONS BOARD,

Defendants.

———o———

This action came on for hearing before this Court on December 16, 1976, and, after due deliberation, a memorandum decision and order of this Court having been rendered on January 31, 1977 and filed February 2, 1977,

IT IS ORDERED AND ADJUDGED

that the motion of plaintiff National Labor Relations Board for a preliminary injunction be denied, and that the motion of defendant Committee of Interns and Residents for summary judgment dismissing the complaint as to all defendants on the ground that it fails to state a cause of action be granted for the reasons stated in this Court's memorandum decision of January 31, 1977.

CHARLES E. STEWART, JR.
United States District Judge

Dated: New York, N. Y.
March 7, 1977.

RAYMOND F. BURGHARDT
Clerk

APPENDIX VIII

Decision and Order of the NLRB in Cedars-Sinai Medical Center

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CEDARS-SINAI MEDICAL CENTER

Employer Case No. 31-RC-2983

and

CEDARS-SINAI HOUSESTAFF ASSOCIATION

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on various dates before Hearing Officer James M. Middleton. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, by direction of the Regional Director for Region 31, this case was transferred to the Board for decision. Thereafter, the

employer and Petitioner filed briefs,[1/] which have been duly considered.

On September 3, 1975, the Board, having determined that this and a number of other cases in the health care industry presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument in several of these cases, including this one. Oral arguments were heard on September 8, 1975. Briefs amici curiae were filed by interested parties and have been duly considered.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

On the entire record in this case, the Board finds:

1. Cedars-Sinai Medical Center is a

private nonprofit California corporation engaged in the operation of a medical center, including acute general hospitals, in the Los Angeles, California, area. The Employer annually receives revenues valued in excess of $500,000 from such operations, and annually purchases goods valued in excess of $50,000 from directly outside the State of California. The parties have stipulated, and we find, that the Employer is engaged in commerce. Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction herein.

2. The Employer contends that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act. The Petitioner's constitution states its purpose is to unite the Employer's interns and residents for the attainment of their collective goals

including, inter alia, contract negotiations pertaining to salaries and working conditions. As we find hereinafter that the interns, residents, and clinical fellows are not "employees" within the meaning of the Act, and the record shows that Petitioner is composed solely and exclusively of interns, residents, and clinical fellows at Cedars-Sinai, we find, for the purposes of this proceeding, that the Petitioner is not a labor organization within the meaning of the Act.

3. No question affecting commerce exists concerning the representation of employee of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act for the following reasons:

As indicated above, Cedars-Sinai is a nonprofit corporation engaged in the operation of a medical center in the

Los Angeles, California, area. The Employer operates two acute general hospitals: the Cedars of Lebanon Hospital Division which is licensed to operate 530 beds; and the Mount Sinai Hospital Division which is licensed to operate 230 beds. The Petitioner seeks to represent a unit of interns, residents, and clinical fellows.[2/] The Employer contends that such a unit is inappropriate because, inter alia, these interns, residents, and clinical fellows are students, not employees. We find merit in the Employer's position, as we find that interns, residents, and clinical fellows, although they possess certain employee characteristics, are primarily students. Accordingly, for the reasons given below, we conclude that the interns,residents, and clincial fellows in the petitioned-for unit are not "employees" within the

meaning of Section 2(3) of the Act.

The record shows that the medical education and training of a physician involves a progression from classroom and laboratory education in the basic and clinical sciences, through an internship, and usually then to a period of more advanced training in a specialty or subspecialty of medicine. It is the purpose of internship and residency programs to put into practice the principles of preventive medicine, diagnosis, therapy, and management of patients that the medical school graduate learned in medical school.

An intern is a medical school graduate serving his first period of graduate medical training in a hospital. Most states, including California, require an internship of 1 year to qualify for the examination to practice medicine. A

resident is a physician who has completed an internship and served a period of more advanced training, lasting from 1 to 5 yeats, in a specialty. A clinical fellow is a physician who has completed an internship and a residency and is taking an educational postgraduate program to qualify for certification in an identifiable subspecialty of medicine. The term "housestaff" is commonly used by medical and hospital personnel, and will be used in this Decision, when referring collectively to interns, residents, and clinical fellows.

Graduate medical education and training programs to qualify for licensing and for certification in a specialty or subspecialty are governed by national medical organizations, such as the American Medical Association, the National Board of Medical Examiners, and the spec-

ialty boards, and by state licensing authorities. The standards for internships and residencies are contained in "Essentials of an Approved Internship" and "Essentials of Approved Residencies," hereinafter the "Essentials," prepared by the Council on Medical Education and approved by the American Medical Association. The programs are carried out in hospitals that are accredited by these various bodies and that in many instances have affiliation agreements with approved medical schools. Cedars-Sinai is such a hospital.

Cedars-Sinai offers internships and residencies in medicine, pediatrics, surgery, obstetrics and gynecology, pathology, psychiatry, and radiology. Its programs are fully accredited by the Council on Medical Education of the American Medical Association and by the var-

ious specialty boards. Ceders-Sinai has affiliation agreements with the UCLA Medical School. Most of Cedars-Sinai's 41 full-time and 25 part-time physicians hold UCLA Medical School appointments and certain of its approximately 1,000 voluntary attending staff physicians who participate in the teaching program also hold UCLA appointments. The medical staff, but not the housestaff, has admission privileges at Cedars-Sinai.

At the time of the hearing, there were 34 interns, 86 residents, and 24 clinical fellows in the various graduate medical training programs at Ceders-Sinai. The majority of the interns and residents were training in the specialty of medicine. The remaining interns were training primarily in pediatrics or surgery and the remaining residents were spread out over the specialties other

than medicine. The vast majority of the clinical fellows were training in sub-specialties of medicine.

The placement of graduating medical students at Cedars-Sinai is governed by the National Intern and Resident Matching Program. This program is designed to place graduating medical students with a preferred graduate training institution. Both the students and the hospitals register with the National Matching Program by signing an agreement that they will be bound by the matching results. The procedure is for a graduating medical student to make out a preference list of positions they have applied for (with or without a personal interview) at the participating hospitals approved by the American Medical Association. The hospitals make out a ranking list of their student applicants. The entire basis for matching decisions is

the student-ranking list in combination with the hospital list.[3/] Appointments of residents and clinical fellows are made by department directors at Cedars-Sinai. Generally, these positions are filled by interns who were originally placed at Cedars-Sinai through the National Matching Program. The activities of interns, residents, and clinical fellows while in graduate program such as those operated by Cedars-Sinai are prescribed by the accrediting bodies and specialty boards which govern graduate medical education, supra. The training programs consist of patient care activities coordinated with a variety of teaching and educational activities designed to develop the student's clinical judgment and proficiency in clinical skills. The record contains numerous examples of the types of patient care

performed by the housestaff in Cedars-Sinai's departments of medicine, pediatrics, and surgery and to a lesser extent in gynecology and the treatment and evaluation center. In general, the patient care activities consist of taking medical histories, performing examinations, preparing medical records and charts, and developing diagnostic and therapeutic plans. The housestaff also participates in service rounds and assists in surgical procedures. These patient care activities, an integral part of a phusician's educational training, are coordinated with a variety of teaching and educational activities, such as grand rounds, teaching rounds, laboratory instruction, seminars, and lectures. A housestaff officer also can take elective courses and participate in rotations to other hospitals.

During their training at Cedars-Sinai, members of the housestaff receive an annual stipend which is on the graduated basis ranging from a first-year intern to a fifth-year resident. The amount of the stipend is not determined by the nature of the services rendered or by the number of hours spent in patient care. Nor does the choice of electives or even rotations to other hospitals affect the amount of the stipend. The "Essentials" characterize the stipend as a scholarship for graduate study. The housestaff also receive a variety of fringe benefits, such as medical and dental care, an annual vacation and paid holidays, uniforms, meals while on duty, and malpractice insurance. They are not eligible for Cedars-Sinai's retirement plan. Discipline is administered by a housestaff committee.

The tenure of interns and residents at Cedars-Sinai is closely related to the length of the program which each individual pursues. The record indicates that 58 of the 120 interns and residents at the time of the hearing were in their first year at Cedars-Sinai, 35 were in their second year, and 22 were in their third year. Thus the average stay of interns and residents at Cedars-Sinai is less than 2 years. As to the clinical fellows, the record indicates that 1974-75 was the first yeat at Cedars-Sinai for seven of them. Following completion of their programs at Cedars-Sinai, the majority of the housestaff go into private practice and others go into group practices or accept positions with health organizations. Only a few interns, residents, or clinical fellows can expect to,

or do, remain to establish an employment relationship with Cedars-Sinai.

From the foregoing and the entire record, we find that interns, residents, and clinical fellows are primarily engaged in graduate educational training at Cedars-Sinai and that their status is therefore that of students rather than of employees. They participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties. While the housestaff spends a great percentage of their time in direct patient care, this is simply the means by which the learning

process is carried out.[187a] It is only through this direct involvement with patients that the graduate medical student is able to acquire the necessary diagnostic skills and experience to practice his profession. The number of hours worked or the quality of the care rendered to the patients does not result in any change in monetary compensation paid to the housestaff members. The stipend remains fixed and it seems clear that the payments are more in the nature of a living allowance than compensation for services rendered. Nor does it appear that those applying for such programs attached any great significance to the amount of the stipend. Rather their choice was based on the quality of the educational program and the opportunity for an extensive training experience. The programs themselves were

designed not for the purpose of meeting the hospital's staffing requirements, but rather to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the eara of his choice. The "Essentials," which describe the standards for approved internships and residencies, indicate that the primary function is educational. Moreover, the tenure of a member of the housestaff at Cedars-Sinai is closely related to the length of the student's training program; thus few interns, residents, or clinical fellows can expect to, or do, remain to establish an employment relationship with Cedars-Sinai following the completion of their programs.

In sum, we believe that interns, residents, and clinical fellows are primarily students. We conclude, there-

fore, that they are not employees within the meaning of Section 2(3) of the Act.[4/] Accordingly, no question affecting commerce exists concerning the representation of "employees" of the Employer within the meaning of Section 9(c) of the Act, and we shall dismiss the petition herein.

Our dissenting colleague has misconstrued the basis for our decision. We are aware that the Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students. However, contrary to out dissenting colleague, we do not find here that students and employees are antithetical entities or mutually exclusive categories under the Act. Instead, we find that the interns, residents, and clinical fellows who filed the petition herein are

primarily engaged in graduate educational training at Cedars-Sinai. It is the educational relationship that exists between the housestaff and Cedars-Sinai (a teaching hospital) which leads us to conclude that the housestaff are students rather than employees, i.e., that the housestaff's relationship with Cedars-Sinai is an educational rather than an employment relationship. Thus, far from "exploiting semantic distinctions," our decision rests on the fundamental difference between an educational and an employment relationship.

In addition to misconstruing our decision, our dissenting colleague advances inapposite considerations which have no bearing on whether interns, residents, and clinical fellows are employees within the meaning of the Act. Thus, whether Cedars-Sinai or any other

"hospital charges fees in amounts in which have sparked national debate," or whether patients "...would hardly take comfort in the notion that the individual in whose hands their life itself may repose...is primarily a student of the matter," has no bearing on the issue here. Similarly, even assuming that "there is some support for the proposition that the primary interest of the housestaff's representational aims is the improvement of patient care," as our dissenting colleague suggests, that aim is of no significance in resolving the employment status of the individuals before us. Furthermore, our dissenting colleague is inaccurate in stating that Cedars-Sinai offers "...no degree, no grades, no examinations." On the contrary, housestaff are regularly evaluated by staff

physicians and Cedars-Sinai is required to certify that the training program has been successfully completed. Teaching hospitals play an integral role in the training of physicians. A graduate of an approved medical school is not ready to practice upon completion of the M.D. requirements. Rather, as more fully described above, he must continue his graduate educational training in a so-called teaching hospital, where the program offered by the hospital and the activities engaged in by the medical students are prescribed by accrediting bodies and specialty boards. In short, it is plain from the record as a whole that the interns, residents, and clinical fellows are engaged in graduate educational training at Cedars-Sinai and that--in view of this educational rather than employment relationship--they are

students rather than employees within the meaning of the Act.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

Dated, Washington, D.C. Mar 19 1976

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

John A. Penello, Member

(SEAL) Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER FANNING, dissenting:

At the outset, I wish to emphasize that the issue in these cases is not how to exploit semantic distinctions between the terms "students" and "employees." One does not, necessarily, exclude the

other and, indeed, this Board had included "students" in bargaining units in numerous cases and has authorized elections in which the voting group was composed exclusively of "students."[5/] The touchstone has always been whether the "students" were also employees. I equally emphasize that the issues before us are simply stated. Are those doctors commonly denominated "housestaff" entitled to bargain collectively under the auspices of our statute and, if so, do they possess a sufficiently distinct community of interests enabling them to constitute an appropriate unit unto themselves? Nevertheless, because my colleagues choose to proceed on such a basis, I turn initially to consideration of the question whether a finding that housestaff officers are "primarily students" justifies the conclusion they

are not, for that reason, "employees" within the intendment of the Act.

I

Section 2(3) of the Act states that the term "employee" is meant to "include any employee . . . unless the Act explicitly states otherwise," and proceeds to explicitly state those excluded from the definition, e.g., agricultural laborers, domestic servants, et al. "Students" are not among those exclusions. Recognition of an underlying Federal policy which seeks to draw a line between labor and management has further led to the exclusion, on such policy grounds, of two additional classes of "employees," namely, confidential and managerial employees.[6/] That is all. Since the statutory exclusions do not mention and the policy underlying the nonstatutory exclusions does not reach "students,"

the relationship between "student" and "employee" cannot be said to be mutually exclusive. The fundamental question then is always whether the individual before us, be that individual "primarily a carpenter" or "primarily a student," is, nevertheless, an "employee" under the Act.

The imprecision which necessarily accompanies the attempt to define an "employee," particularly in terms well suited to modern industrial relations, accounts for the deliberate refusal of the drafters of the Wagner Act to define the term in any but a circular fashion. "An employee includes any employee." Historically, that approach gave rise to two conflicting views. The primary consideration, it was contended on one hand, "is whether effectuation of the declared policy and purposes of the Act comprehended securing to the individual the

rights guaranteed and protection afforded by the Act."[7/] Such circularity, it was stated on the other, reflected no more than a congressional intent to ascribe an "ordinary meaning" to the term, as that meaning was "developed under the common law."[8/]

For present purposes, it is unnecessary to consider either the vitality of those early decisions which resolved the matter in favor of the former, more liberal, interpretation or the applicability of those decisions which, in the context of employee/independent contractor disputes, upheld the latter.[9/] If we posit that Section 2(3)'s usage of the term "employee" is no broader than the common law's, housestaff officers are, beyond doubt, employees within the meaning of the Act.

The term "employee" is the outgrowth

of the common law concept of the "servant."[10] At common law, a servant was a "person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control."[11] Although, under the common law, considerations for the services performed does not appear to have been a sine qua non of establishing the master-servant relationship,[12] it is generally conceded, today, that such consideration is necessary for classification as an "employee."[13] So that the conventional meaning of the word implies someone who works or performs a service for another from whom he or she receives compensation.[14]

It is significant to note that the common law's development of the master-servant doctrine was principally con-

cerned with establishing a tortious liability in the master for the acts of the servant[15] and, indeed, the principle of respondent superior plays more than a small part in the current malpractice crisis of which we are all aware. That my colleagues have ignored a significant component of the hospital-housestaff relationship namely the former's vicarious liability for the actions of the latter,[16] is a convenient introduction to another aspect of these cases which requires greater discussion-- the facts.

All housestaff officers are M.D.'s. All fellows and residents are licensed physicians in every State of the Union. It is, of course, impossible to set forth the full range of services these phyisicans perform for the hospital, and, more importantly, for the patient, but

my colleagues' silence as to what these housestaff officers do cannot go unnoted. The records before us demonstrate, for example, that housestaff officers, without immediate supervision of any kind, continually deal in matters literally of the ultimate significance. That they do is a function, no doubt, of their hours. The housestaff work round-the-clock, 7 days a week, 52 weeks a year. No other physicians do. They perform their services, on an individual basis, for periods lasting, at times, well over 100 hours a week, in shifts that often exceed 50 consecutive hours. They singly staff emergency rooms, frequently at times when their supposed "teachers" are not even in the facility. That accounts for the record facts which demonstrate that, without supervision, a housestaff officer can be called upon and, in fact,

has been called upon, to open the chest wall of a 3-year-old child; hold the heart of a patient in his hands; remove breast tissues, kidney, veins; deliver babies; insert tubes in the tracheae of newborns and catheters into abdominal cavities; administer closely controlled and potentially lethal medication; and for a host of similar procedures.

For those services and innumerable others supervised by medical staff but performed by housestaff, the hospital charges fees in amounts which have sparked national debate. In return for those services, the hospital pays that housestaff officer what my colleagues call a "stipend." It exceeds, in some cases of multiple residencies, $20,000 a year. From that "stipend," the hospital withholds Federal and state taxes,[17/] contributes to social security, and provides

for health insurance. The hospital grants vacations and sick leave, laundry allowances, etc. For the negligent performance of those services the hospital can be sued. For those services the housestaff receives, absent unusual circumstances not before us, no degree, no grades, no examinations. Housestaff officers perform those services on (and in) individuals who would hardly take comfort in the notion that the individual in whose hands their life itself may repose is not primarily interested in performing that service for the hospital and patient but, rather, is primarily a student of the matter. In point of fact, according to a study initiated by the Association of American Medical Colleges itself, approximately 80 percent of a housestaff officer's time is spent "in direct patient care activities."[18/] Cer-

tainly, there is a didactic component to work of any initiate, but simply because an individual is "learning while performing this service cannot possibly be said to mark that individual as "primarily a student, and, therefore, not an employee" for purposes of our statute. Discourse on the exhaustive indicia of "employee status" enjoyed by housestaff officers and ignored by my colleagues should not be undertaken at the expense of what my colleagues actually do say. I turn briefly to a consideration of the limited factors upon which my colleagues purport to rely:

> [a] The "Essentials," which describe the standards for approved internships and residencies, indicate that the primary function is educational.

The "Essentials" constitute, in part, a set of guidelines and instructions to hospitals which would seek to become

training institutions. Because the hospitals are instructed to view the primary purpose of housestaff programs as educational has no bearing on whether the housestaff ultimately performs a service for compensation[19] and certainly is not entitled to overcome the classic employment relationship between housestaff officers and these hospitals. In fact, the "Essentials" acknowledge that relationship by their mandate of "Employment Agreements" which "should specify at a minimum . . . the salary . . . vacation periods . . . hours of duty." etc., of housestaff officers. In accordance with that mandate, the AMA, on January 13, 1975, distributed a memorandum to all approved teaching hospitals reporting the adoption of "Guidelines for Housestaff Contracts or Agreements" by the AMA house of delegates. It is an in-

structive piece of record evidence:

> The agreement should provide for fair and equitable conditions of employment for all those performing the duties of interns residents and fellows . . . .
>
> The institution and the individual members of the housestaff must accept and recognize the right of the housestaff to determine the means by which the housestaff may organize its affairs, and both parties should abide by that determination; provided that the inherent right of a member of the housestaff to contract and negotiate freely with the institution, individually or collectively, for terms and conditions of employment and training should not be denied or infringed. No contract should require or proscribe that members of the housestaff shall or shall not be members of an association or union. [Emphasis supplied.]

Other guidelines are variously listed under the following subject headings: Salary for Housestaff, Hours of Work, Off-Duty Activities, Vacation and Leave, Insurance Benefits, Professional Liability Insurance, Grievance Procedure, and Disciplinary Hearings and Procedure.

I do not see how my colleagues can ignore such compelling evidence that the ultimate authority governing housestaff relationships and programs so clearly considers these individual to be employees.

> [b] Nor does it appear that those applying for such programs attached any great significance to the amount of the stipend.

In the cases before us, there is some support for the proposition that the primary interest of the housestaff's representational aims is the improvement of patient care. There is, further, some support for the proposition that the primary value attached to an individual residency or subspecialty is the quality of the institution providing that program, and the opportunity of exposure to a wide range of medical experience. That is, hopefully, not a unique approach in any field of endeavor, particularly profes-

sional ones. There is, on the other hand, absolutely no support for a statement which implies that the so-called "stipend" (the AMA calls it "salary," the study initiated in part by AAMC calls it a "wage," the IRS calls it "payment for services rendered") is not a considerable source of concern. Support for the majority proposition requires, merely, the complete dismissal of the testimony of housestaff representatives before Congress[20] and the congressional response to it.[21]

> [c] [T]heir choice was based on the quality of the educational program and the opportunity for an extensive training experience. The programs themselves were designed... to allow the student to develop, in a hospital setting, the clinical judgment and the proficiency in clinical skills necessary to the practice of medicine in the area of his choice.

I fail to perceive how the fact that an individual desirous of becoming

an orthopedic surgeon chooses a residency program based on its quality and the opportunity for extensive training bears relevance to the question whether, having done so, he or she is an "employee" under the Act. It is, for example, fairly common knowledge that physicians engaged in private practice for many years take up residencies both <u>within</u> their certified specialty (to keep abreast of developments) and <u>outside</u> their certified specialty (to expand upon their skills). That the housestaff officer's choice[22/] is "based on the quality of the educational program and the opportunity for...extensive training" is not so much evidence that he or she is "not an employee" as it is evidence of the desire, as the residencies of fully licensed and certified practictioners demonstrate, of some individuals to perform their functions

well.

Finally, in my consideration of what my colleagues have actually stated, as opposed to the notable matters they have ignored, mention must be made of my colleagues' final footnote:

> As we have found, for the reasons stated above, that interns, residents, and clinical fellows are not employees within the meaning of the Act, we find no merit in Petitioner's contention that they are employees based on Sec. 2(11) and (12) of the Act. . . .

That simple footnote marks the majority's response to the two most significant considerations presented by these cases--the language of the statute and the intent of Congress.

III

Section 2(12) of the Act sets forth the definition of a "professional employee" as:

> (a) any employee engaged in work... (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning to a hospital..or
>
> (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a). [Emphasis supplied.]

Section 2(12) was, in part, designed to cover housestaff specifically. In the words of the House Conference Report accompanying the Taft-Hartley amendments to the Act, the section was designed to embrace "such person as legal, engineering, scientific and medical personnel together with their junior professional assistants"[23] and, as the language of Section 2(12)(b) so clearly states, included in the definition of profes-

sional employee are individuals who have completed courses of specialized instruction and are performing related work under the supervision of Section 2(12)(a) professionals. The definition fits, precisely, housestaff officers. Presumably, the theory underlying my colleagues' position is that Section 2(12) initially defines a professional employee as "an employee who," and since housestaff are not employees in the first instance the remainder of Section 2(12) is irrelevant. But the "employee" to whom Section 2(12) initially refers is the "employee" of Section 2(3), which does not exclude "students." More importantly, I think it the better course to consider the clear language of Section 2(12) as bearing on the scope of Section 2(3) than to reverse the process and disregard, initially, Section 2(12) and the legisla-

tive history behind it; establish, without reference to its language or our precedents, the scope of Section 2(3); and, finally, utilize the conveniently established limits of Section 2(3) to rule out application of Section 2(12). The latter "analysis" would normally merit more attention were there not an example of an even more questionable statement within the majority's final footnote.

A large segment of the committee hearings on the recent amendments was devoted to the testimony, statements, and accompanying documents of representatives of the housestaff[24/] in support of the amendments. For the most part, the testimony concerned itself with the contention advanced by the Physicians National Housestaff Association, amicus

here, that housestaff officers should be excluded from the ambit of Section 2(11) of the Act, which sets forth the definition of "supervisor," because housestaff officers do not exercise supervisory authority "in the interest of the employer." At no time during the course of the hearings was even a mention made that housestaff officers, because "students," might not be entitled to coverage under the Act.[25/] In point of fact, any reasonably diligent reading of the legislative history surrounding the amendments would make it clear that coverage of housestaff, in some context, was an assumption on the part of Congress. That is evident when one considers the congressional response[26/] to the housestaff representatives' contention that amendment of Section 2(11) was necessary:

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". The Committee has studied this definition with particular reference to health care professionals, such as. . . interns, residents, fellows . . . and concludes that the proposed amendment is unnecessary because of existing Board decisions. The Committee notes that the Board has carefully avoided applying the definition of a "supervisor" to a health care professional who gives direction to other employees, which direction is incidental to the professionals treatment of patients and thus is not the exercise of supervisory authority in the interest of the employer. [Emphasis supplied.]

Throughout the debates on the floors of both Houses, again, no mention of the "student" status of housestaff officers can be found. Senator Cranston, co-sponsor and floor manager of the Senate bill, indicated, on the other hand, that one of the conditions the bill was designed to redress was the "notoriously underpaid

. . . average annual salary for all hospital employees--including doctors . . . . According to [the] president of the Physicians National Housestaff Association, the average house staff officer--intern, resident, or fellow--works 70 to 100 hours per week, and earns about $10,000 per year. His hourly wage, then ranges from $1.92 to $2.74."[27] The majority's response to the above legislative history bears repeating:

> As we have found . . . that interns, residents, and clinical fellows are not employees . . . we find no merit in Petitioner's contention that they are employees based on Sec. 2(11). . . .

Obviously, no petitioner has contended that it represents "employees" because it represents "supervisors." And yet, that, apparently, is how my colleagues dismiss the compelling argument that, in treating the question of amend-

ment to Section 2(11), Congress clearly and explicitly recognized housestaff as employees.

It is clear to me, as the language of Section 2(12) states, the legislative history of Section 2(12) states, the Committee Reports on the hospital amendments state, and Senator Cranston states in explanation to his colleagues, that housestaff officers are covered by this Act.

IV

Thus far I have attempted to deal with the substantial errors in judgment I perceive in my colleagues' disposition of these cases. But apart from what I consider to be their misstatement of the issue in these cases, what I know to be their failure to set forth the complete facts, and what I am convinced in their trifling with the language of

our statute and its legislative history, my disagreement with my colleagues, in these cases, equally extends to an understanding of the very purposes of this statute and, more particularly, the additional responsibilities we have recently assumed as a result of the clearly stated congressional conviction that labor relations in the vital health care industry is best governed by this statute. That conviction flows from another, expressed through all the Congresses that have considered our statutory scheme---that this statute is protective and ameliorative. To read the legislative history of the most recent amendments is but to recognize that conviction. Thus, in considering how to minimize the potential for disruption of medical services inherent in an amendment granting significant

numbers of employees the right to strike, Congress, realizing that recognitional strikes do not cease because outlawed, considered it the wiser course to make available the provisions of this statute for the orderly resolution of such recognitional struggles: "The Committee was also impressed with the fact, emphasized by many witnesses, that the exemption of nonprofit hospitals from the Act had resulted in numerous instances of recognition strikes and picketing. Coverage under the Act should completely eliminate the need for amy such activity, since the procedures of the Act will be available to resolve organizational and recognition disputes."[28/]

And so there is a pathetic irony in what my colleagues do today. The onset of organization of housestaff officers is among us. Fewer cases may

come to this Agency, but as many will come to the training hospitals. The one group so singularly involved in the congressional issues, both in terms of its immediate relationship with the delivery of medical services and in terms of its recognitional interests, is, today, by fiat, read out of the Act. This decision is not grounded in the statute, the law, or reason. Accordingly, I must dissent.[29]

Dated, Washington, D.C. Mar 19 1976

John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

FOOTNOTES

1/With the Board's consent, Association of American Medical Colleges and the Physicans National Housestaff Association submitted amicus curiae briefs, which have also been carefully considered.

2/Petitioner does not seek to represent research fellows.

3/If an applicant goes unmatched, he makes individual arrangements among the positions that remain unfilled after the matching.

4/As we have found, for the reasons stated above, that interns, residents, and clinical fellows are not employees within the meaning of the Act, we find no merit in Petitioner's contention that they are employees based on Sec. 2(11) and (12) of the Act, which defines the terms "supervisors" and "professional employee," respectively.

5/The Macke Company (II), Case 2--RC--16725 (Not reported in volumes of Board Decisions.) The Macke II students were those originally excluded from the merit found appropriate in The Macke Company, 211 NLRB 90 (1974).

6/For a more authoritative discussion, see N.L.R.B. v. Bell Aerospace Company, Division of Textron, Inc., 416 U.S. 267 (1974).

7/N.L.R.B. v. Hearts' Publications, Incorporated, 322 U.S. 111, 131-132 (1944).

8/Id. at 120, et seq. See also I Leg. Hist. 309 (1947).

9/Compare Hearst, supra, with N.L.R.B. v. United Insurance Company, 390 U.S. 254, 256 (1968). See Boire v. Greyhound Corp., 376 U.S. 473, fn. 10 (1964).

10/See 30 C.J.S. Employee at 672 (Corput Juris Secundum). "The shift to the first terminology seems to have accompanied the development of workmen's compensation legislation, which makes clear the substantial identity of the two." Stevens, "The Test of the Employment Relation," 38 Mich. L. Rev. 188, 189 (1939).

11/Restatement (Second), Agency § 200 (1957). See also § 2: "A servant is an agent employed by a master to perform service in his affairs . . . ."

12/Id. at § 225, a.

13/See, e.g., 30 C.J.S., supra at 673.

14/See I Leg. Hist. 309 (1947). See, e.g., Meyer Dairy, Inc., a Subsidiary of Milgram Food Stores, Inc. v. N.L.R.B., 429 F.2d 697, 701 (C.A. 10, 1970). This notion of the "performance of a service for another" merits an aside, for it points out a fundamental confusion on my colleagues' part. Presumably, the basis for the majority opinion is found somewhere within the confines of The Leland Standord Junior University, 214 NLRB No. 82 (1974). The Stanford petit-

ioner sought to represent 83 "research assistants" who were graduate students enrolled in Standord's doctoral physics program. The research they conducted was a fundamental and required part of the course of instruction leading tc the degree. The research they conducted was thesis oriented, that is to say, and this is a crucial point, the research assistants did not perform a service for Stanford. With guidance, perhaps, from their mentors, they independently selected their research projects. They performed that research for themselves. In terms of the actual research conducted, Stanford was essentially, a disinterested party. Stanford did not control the research, did not request the research, and, most significantly, did not receive renumeration from a third party for the particular research. All of which is to say, as Cornell University, amicus curiae in the case, pointed out, the research assistants did not work for the alleged employer, and, therefore, were not employees. It is a point of moment. We do not exclude students from coverage because they are students (even less the case where they are "primarily students"). In certain cases, they will be excluded because, as students, they do not work or perform a service for an employer. In other cases, they will be excluded from the unit found appropriate because, as students, their interests may not be aligned with those of other employees. There is, on the other hand, simply no basis either in the Act or in our precedents for concluding that under any circumstances students and employees are antithetical entities.

15/See Stevens, supra at 189.

16/See Hospital Law Annual, Administrators' Vol. 1(a), 9. Compare Rosane v. Sanger, 112 Colo. 363 (1944), holding a medical staff physician's actions not to have created a liability in the hospital. The fact that liability can be imposed upon the hospital for the actions of its housestaff and will not, under certain circumstances, be imposed for the actions of medical staff is further demonstration that housestaff officers work for the hospital.

17/The "stipend" is taxable income. Although amicus AAMC contends that this point is in doubt, I find no support for that doubt in terms of the type of housestaff officers and training institutions before us. Because of AAMC's position, it merits attention. Under sec. 117 of the Internal Revenue Code, fellowships and scholarships are, under certain conditions, generally excludable from gross income. Such fellowships and scholarships are not excludable if they constitute compensation for services rendered. From the very beginning of sec. 117, added to the Code in 1954, to this very day, the Department of Treasury has taken the position that the typical housestaff officer receives compensation for services rendered. Rev. Rul. 57--386, 1957--2 Cum. Bull. 107; Rev. Rul. 68--520, 968--2 Cum. Bull. 58; Rev. Rul. 71--36, 1971--2 Cum. Bull. 99; Rev. Rul 75--490 at 5 (Bull. No. 1975-46). The uniformity of approval of that position is not lightly dismissed. Hembree v. U.S., 464 F.2d 1262 (C.A. 4,

1972); Wertzberger v. U.S., 441 F.2d 1166 (C.A. 8, 1971); Quast v. U.S. ,428 F.2d 750 (C.A. 8, 1970); Woddail v. Commissioner, 321 F.2d 721 (C.A. 10, 1963); Tobin v. U.S., 323 F.Supp. 239 (D.C. Tex., 1971); Taylor v. U.S., 22 AFTR2d 5246 (D.C. Ark., 1968); Lingl v. Charles, 21 AFTR2d 410 (D.C. Ohio, 1967); Proskey v. Commissioner, 51 T.C. 918 (1969); Kadivar T.C. Memo 1973-95; Kaufman, T.C. Memo 1973-21.

There are, of course, cases, the most notable of which is Leathers v. U.S., 471 F.2d 856 (C.A. 8, 1972), which hold, under certain circumstances, the appropriate portion of the"stipend" to be excludable. My analysis of those cases reveals that they do not reflect the typical intern/resident case, to the extent that the individual involved in such cases is either not as actively involved in direct patient care (e.g., Dr. Leathers in Leathers, supra, who devoted the bulk of his time to personal research or study) or the residency involved is undertaken either at the behest of a third-party grantor or in a facility in which the admission of patients is incidental to the purpose of the facility (e.g., the Western State Psychiatric Institute in Wrobleski v. Bingler, 161 F.Supp. 901 (D.C. Penn., 1958). Leathers, supra, did not hold, as AAMC argues that the "stipend" is partially excludable; it merely held that there was substantial evidence justifying the below jury's verdict. Compare the other Eighth Circuit decisions in Quast and Wertzberger, supra. Wrobleski, supra, issued, of course, prior to the

lead Supreme Court decision in the area, Bingler v. Johnson, 344 U.S. 741 (1969). In Bingler, the Supreme Court held that the sec. 117 exclusion would be applicable only where the "stipend" was a "relatively disinterested 'no strings' educational grant." I find it difficult to accept my colleagues' apparent conclusion that the hospitals before us stand as disinterested grantors of "stipends" to which no strings are attached. These "stipends" are compensation for services rendered. Make no mistake, as my colleagues do, about that. The recipients are, therefore, employees.

18/A. Carroll, "Program Cost Estimating In a Teaching Hospital" at 76. The study was jointly sponsored by the AMA, AAMC, and American Hospital Association (AHA). It is revealing in several respects, not the least of which is its demonstration that parties to Board proceedings have been known to be less than candid. I quote from the study:

> The patient care that interns and residents provide is similar to the care that a patient would receive from a practicing physician of his choice. The resident does all of the things that any other physician would do except that where he has not been thoroughly trained, he performs under close supervision. . .
>
> [T]he hospitalized patient can receive competent medical care regular routinely, or in emergencies as often as he may need it. This would not be possible without either an

> adequate number of interns and residents or a very large staff of full-time physicians. The present intern and resident system . . . gives hospitals and attending physicians a way to maintain constant stand-by physician services for all hospital patients. And the overall costs of this stand-by care are considerably lower than would otherwise be possible. A patient who has been informed that the intern and resident physicians who care for him work hand in hand with his own private physician and carry out his orders in all important matters will recognize these house staff services as an essential part of the care he receives while in the hospital. [Emphasis supplied.]

19/The study referred to in the preceding footnote devotes substantial discussion to the cost benefits of housestaff programs. The "Essentials" description of such programs as primarily educational may fairly be read as a proper admonition to would-be training institutions not to consider establishment of such programs as a convenience whereby professional medical service may be increased without incurring the greater cost that would otherwise flow from an increase in the medical, as opposed to house staff. Indeed, the "Essentials," in the same section, remind such institutions that the "primary function" of the training institution will continue to be "providing adequate facilities for the scientific care of the sick and injured."

20/See, e.g., Hearings on S.794, S. 2292, Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Cong., 1st Sess. at 291--295, 380-382 [hereinafter Hearings]. See also Hearings on H.R. 11357, Before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 92d Cong., 2d Sess. at 29--31.

21/See, e.g., 120 Cong. Rec. S6933 (daily ed., May 2, 1974) (remarks of Senator Cranston).

22/Considerable attention was devoted in these cases, as the majority opinion reflects, to the procedure by which housestaff officers are employed. The degree of "freedom of choice" accompanying an employment relationship is largely irrelevant once it is established that the individual in question in point of fact performs a service for compensation. Witness, e.g. the "hiring" procedures of professional athletes. National Football League Management Council, et al., 203 NLRB 958 (1973), and individuals supplied by referral agencies, Manpower, Inc. of Shelby County, 164 NLRB 287 (1967).

23/I Leg. Hist. 540 (1947).

24/See Hearings, supra at 291--423.

25/The AAMC, amicus here, filed a statement subsequent to the testimony and statements of the housestaff representatives. Id. at 636. Support for the proposition that AAMC and the employers in these cases are accomplishing here

at the Board what they could not and would not accomplish before Congress is gleaned from the fact that AAMC did not, at that time, even mention the argument so readily accepted by my colleagues.

26/S. Rept. 93--766, 93d Cong., 2d Sess. 6 (1974). The same language appears in the substantially identical House Report.

27/120 Cong. Rec. S6933 (daily ed., May 2, 1974)(emphasis supplied).

28/S. Rept. 93--766, supra at 3.

29/There is a seeming futility in my addressing the subsidiary unit question presented by these cases. But, for the purpose of wholeness and because I suspect that what my colleagues have done today is, in part, shaped by that consideration, I deem it fitting to set forth my views. I would grant a unit of all housestaff officers, to include all fellows. Although the singularity of interests I perceive in these cases runs, generally, only to interns and residents, I nevertheless believe all fellows, by virtue of the fact they are house and not medical staff, and by virtue of that fact alone, must be included. With the exception of amicus AAMC and the employer in St. Christopher's Hospital for Children, 223 NLRB No. 58, issued this day, no employer in the cases decided today contends salaried attending physicians must further be added to the "house staff unit." Nevertheless, one of the unit considerations presented by these cases flows from the expressed congressional admonition to this Board

to consider unit questions, in part, from the standpoint of the number of units which might otherwise result from an individual unit determination and, consistent with Board standards in this area to avoid a proliferation of bargaining units.

A unit of housestaff implies, I suspect, a unit of salaries attending staff. Thus, it is conceivable that in any given institution as many as four professional units may result from that determination, given the Board's determination of the appropriateness of a unit of registered nurses, when sought separately (Mercy Hospitals of Sacramento, Inc., 217 NLRB No. 131 (1975).) The establishment of a unit combining all doctors, thus, has considerable appeal, especially at first glance. However, on my analysis of the records in these cases, it appears to me that in consequence of the vast operational authority vested in medical staff salaried attending physicians in training institutions approximate managerial employees. In addition, their role in relation to housestaff leads me to conclude with a greater degree of assurance that, absent unusual circumstances, they are also supervisory. Finally, as a practical matter, while organizational efforts among attending staff exist, organization of such highly paid individuals can fairly be expected to be minimal. For those and other reasons requiring a more detailed discussion inappropriate here, I resolve the matter on the side of an "all-housestaff" unit. Finally, I note for my colleagues that the Board has already, through its Regional Directos, certified what amount to

housestaff units in Kingsbrook Jewish Medical Center, Case 29--RC--02785, and Children's Hospital of the District of Columbia, Case 5--RC--09152. All of which tends to demonstate, I suppose, that when left to their own devices institutions which truly accept the rights and responsibilities set forth in the Act can come to live with that fact.

APPENDIX IX

Decisions and Orders of the NLRB in Kansas City General Hospital

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KANSAS CITY GENERAL HOSPITAL
AND MEDICAL CENTER, INCORPORATED
AND HOSPITAL HILL HEALTH SERV-
ICES CORPORATION

Employers

Case 17--
RC--7656

and

THE HOUSESTAFF ASSOCIATION OF
KANSAS CITY GENERAL HOSPITAL
AND MEDICAL CENTER

Petitioner

REVISED DECISION AND ORDER

On June 24, 1976, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1/] wherein it dismissed a petition seeking to represent a unit of residents and interns employed by Hospital Hill Health Services Corporation[2/] based on the Board's Decision in Cedars-Sinai Medical Center.[3/] In dismissing the petition, the Board panel used the following language:

In Cedars-Sinai Medical Center, 223 NLRB No. 57 (1976), the Board found[4] that residents, interns, and fellows are not "employees" within the meaning of Section 2(3) of the Act. That being so, Hospital Hill is not an "employer" within the meainng of Section 2(2) of the Act for the purpose of any disputes relating to such personnel.[5]

Accordingly, as the Petitioner seeks to represent only individuals who are not "employees" within the meaning of the Act, we shall dismiss the petition herein.

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[4] Member Fanning dissenting.

[5] Our finding herein should not be construed as a determination that the Board would not find Hospital Hill to be an employer within the meaning of the Act and within the Board's statutory and discretionary judgment for other purposes. [Remainder of footnote omitted.]

Since its issuance, the Board's Decision and Order herein has been cited, specifically by the Supreme Court of the State of New York,[4] in support of the view that the Board does not consider state jurisdiction over interns and residents to have

been preempted by the 1974 health care amendments to the National Labor Relations Act. To eliminate unnecessary language appearing in the Board's Decision and Order herein, which in our view has prompted the New York Supreme Court to resolve improperly the preemption question, and to eliminate any doubt that it was the intention of a majority of the Board, in Cedars-Sinai, to find state jurisdiction over residents, interns, fellows to have been preempted by the Federal statute, we have decided, sua sponte, to reconsider and revise the Decision and Order issued in the above-entitled proceeding, and to substitute this Decision for the earlier one.

In the instant case, the Petitioner, as noted above, is seeking to represent a unit of residents and interns employed

by Hospital Hill. The parties have stipulated, and we find, that Hospital Hill is an employer within the meaning of the Act and thus that it will effectuate the policies of the Act to assert jurisdiction herein.[5/] With regard to the labor organization status of the Petitioner, we find, for the purpose of this proceeding, that the Petitioner is not a labor organization within the meaning of Section 2(5) of the Act as it is composed solely and exclusively of individuals who are not "employees" within the meaning of the Act. Accordingly, we find, in view of our Decision in Cedars-Sinai where the Board determined that interns, residents, and fellows are not "employees" within the meaning of Section 2(3) of the Act, that no question affecting commerce exists concerning the representation of "employees"

the Employer within the meaning of Section 9(c) of the Act and thus we shall dismiss the petition herein.

Included in the language quoted hereinabove from the original Decision and Order is the statement that "Hospital Hill is not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to [residents, interns, and fellows]." (Fotenote omitted.) This statement, which in our view was not in any way crucial to the result reached in the Decision and Order herein, has proved to be subject to varying interpretations with regard to its impact on related preemption questions. Thus, this Revised Decision and Order, in dismissing the petition, disavows the above-quoted statement and relies solely on the stipulation as to the employer status of

Hospital Hill and on the fact that the Petitioner is seeking to represent only individuals who are not "employees" within the meaning of the Act.[6/]

Turning to the preemption question, we believe that it has now become necessary for us to state explicitly that which is, in our view, implicit in the Board's Decision in Cedars-Sinai; that is, at the risk of being somewhat repetitious, that the majority of this Board intended by its decision therein to find federal preemption of the health care field to preclude States from exercising their power to regulate in this area. It is our judgment that the Congress, in passing the 1974 health care amendments, simply made a determination that residents, interns, and fellows, inter alia, were not supervisors within the meaning of the Act, but left

the question as to whether they were "employees" entitled to collective-bargaining rights for resolution by the Board in the exercise of its discretion.[7/] Having exercised its discretion in Cedars-Sinai, by finding residents, interns, and fellows to be primarily students and not "employees" within the meaning of the Act, the Board confirmed, in our view, that it has not put hospital residents and interns beyond the reach of national labor policy, but has rather held that to extend them collective-bargaining rights would be contrary to that very policy.

ORDER

It is hereby ordered that the petition filed herein be, and it hereby is dismissed.

Dated, Washington, D.C.
November 8, 1976

Betty Southard Murphy,
Chairman

Howard Jenkins, Jr.,
Member

John A. Penello,
Member

Peter D. Walther,
Member

NATIONAL LABOR RELA-
TIONS BOARD

(SEAL)

MEMBER FANNING, dissenting:

I dissent from my colleagues' decision to reconsider, sua sponte, the original decision in this case, and from their reconsidered decision.

I would not be averse to reconsider if the purpose were to reverse my colleagues' decision that interns, residents, and fellows employed by the Employer are not employees within the meaning of Section 2(3) of the Act. Such a reversal would not only remove an aberration from

the law, it would also achieve what my colleagues profess to be their goal herein--establishment beyond question of the proposition that the Act has preempted state regulation of labor relations of hospitals and housestaff.

My colleagues' reconsideration, however, is limited to the withdrawal from their original decision herein of the finding that, "Hospital Hill is not an 'employer' within the meaning of Section 2(2) of the Act for the purpose of any dispute relating to such personnel." In their view such language was unnecessary to the original decision and "has prompted the New York Supreme Court to resolve improperly the preemption question." So, "to eliminate any doubt that it was the intention . . . in Cedars-Sinai to find state jurisdiction over residents, interns,

and fellows to have preempted by the Federal statute," my colleagues have withdrawn the finding of nonemployer status of the hospital in its relationship vis-a-vis housestaff.

Of course, simply withdrawing the finding does not change the relationship. If housestaff are not "employees" of the hospital, it is rather difficult to establish the proposition that the hospital is their "employer." But I do not read my colleagues' opinion as trying to establish that proposition; they wish merely to withdraw their own statement in recognition of the contrary, hopeful, apparently, that once withdrawn no state court or board will be perceptive of the reality behind their Cedars-Sinai decision. To that extent, my colleagues perform merely a useless and futile act. They do not stop

there, however. They have added the finding, not found in the original decision, that "Petitioner is not a labor organization within the meaning of Section 2(5) of the Act, because it is composed solely and exclusively of individuals who are not 'employees' within the meaning of the Act," and they insist that their Cedars-Sinai decision simply resolved a question of policy that Congress had entrusted the Board to make, and that therefore, having, in the exercise of discretion decided to withhold from housestaff the operation of those provisions of the Act which would protect their right to organize and bargain collectively, no state can enter the field to bestow upon housestaff such protection under state laws.

But observe, the effect of my colleagues' decision is that housestaff,

though not protected in their right to organize and bargain collectively, are not prohibited from doing so, and their organizational, recognitional, and bargaining strikes are no longer subject to the restraints on such activities that Congress enacted specifically to regulate such activities in the health care industry. For if housestaff are not employees, if their associations are not labor organizations, none of the provisions of Section 8(b), 8(d), and 8(g) apply to such activities. Of course, it is true also that the restraints of Section 8(a) do not apply to those hospitals wishing to combat housestaff attempts to organize and bargain collectively. My colleagues have, thus, assertedly as an exercise of discretion, decided that it will effectuate the policies of the Act

not to apply provisions of the Act enacted specifically to bring about the peaceful settlement of labor disputes in this industry to the end that patient care will not be disrupted. They now compound the problem by seeking to preclude intervention by any state court or board, whether by making available procedures for the peaceful settlement of such disputes, or by injunction. Such disputes will be resolved solely in accordance with the militancy and economic resources of the contending parties, free of any restraining or mediatory influences of Federal or state law. If this be preemption, it is preemption solely for its own sake. It is not preemption designed to carry forward any policy established by Congress:

> The Committee was also impressed with the fact, emphasized by many

> witnesses, that the exemption of non-profit hospitals from the Act had resulted in numerous instances or recognition strikes and picketing. Coverage under the Act should completely eliminate the need for such activity, since the procedures of the Act will be available to resolve organizational and recognition disputes.8/

Those procedures and those designed "to insure the continuity of health care to the community and the care and well being of patients by providing for a statutory notice of any anticipated strike or picketing"[9/] and "for mandatory mediation by the parties with the FMCS in the case of collective bargaining [disputes]"[10/] are, by my colleagues' act of "discretion," no longer applicable to disputes involving housestaff. Yet they wish also to preclude the States from intervening in order to effectuate peaceful resolution of such disputes. I must, and do, dissent.

Dated, Washington, D.C.
November 8, 1976

John H. Fanning,
Member

NATIONAL LABOR RELATIONS BOARD

Footnotes

1/225 NLRB No. 14 (1976) (Chairman Murphy and Member Penello; Member Fanning dissenting).

2/Herein referred to as Hospital Hill.

3/223 NLRB No. 57 (1976).

4/For New York County, Special Term: Part I in the matter of Committee of Interns and Residents v. The New York State Labor Relations Board, Index No. 15928/76 (1976).

5/Following the hearing, however, in its brief to the Board, Hospital Hill raised the argument that it is a joint employer with the state of Missouri, in connection with the administration of Hospital Hill's residency program. In dismissing the petition herein, we find it unnecessary for the purposes of this proceeding to consider or pass upon the joint employer issues raised by Hospital Hill since there is a stipulation as to the employer status of Hospital Hill, which we have accepted, and even if we were to look beyond that stipulation and find that Hospital Hill and the University of Missouri are joint employers, we would dismiss the petition on that basis.

6/Chairman Murphy and Member Penello, who participated in the Decision and Order herein, signed the majority opinion which contains the language quoted in this paragraph. We did so, however, because we believe that it logically followed that

the Employer, Hospital Hill, could not be an employer of nonemployees; in our view, interns, residents, and fellows. The preemption issue was never raised or litigated by the parties nor was it considered or even contemplated by us in reaching our decision. Now that the New York Supreme Court has attempted to broaden the original Decision and Order to encompass the preemption issue, we have decided to join our colleagues in deleting the quoted language in this Revised Decision and Order to avoid even the slightest impression that a majority of this Board believes that state jurisdiction over residents, interns, and fellows has not been preempted by the Federal statute.

In addition, however, Chairman Murphy notes that it was not her intent at the time this case was decided that the Board was preempting the field insofar as Federal labor policy might apply to interns and residents, but she has now been persuaded that this was the effect of the 4 to 1 majority holding herein.

7/On the supervisory issue, see S. Rept. 93d Cong., 2d Sess. 6 (1974). The same language appears in the substantially identical House Report.

8/S. Rep. No. 93-766, p. 3.

9/Id. at p. 4.

10/Id. at p. 5.

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on various dates before Hearing Officer Ronald Broun. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Regulations and Statements of Procedure Series 8, as amedned, by direction of the Regional Director for Region 17, this case was transferred to the Board for decision. Thereafter, the Hospitals, Petitioner,[1/] and Intervenor[2/] filed briefs.

Pursuant to the provisions of Section 3(b) of the Nation Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and

finds that they are free from prejudicial error. They are hereby affirmed.

On the entire record, the Board finds:

The Petitioner seeks to represent a unit of residents and interns employed by Hospital Hill Health Services Corporation (hereinafter referred to as Hospital Hill).[3/] Hospital Hill is a private not-for-profit professional corporation, established under the laws of the State of Missouri, using the services of physicians, dentists, residents, and interns and supplying medical and dental services, through its professional staff, to various hospitals and health care institutions in Kansas City and Jackson County, Missouri. The parties stipulated that Hospital Hill annually receives gross revenues valued in excess of $250,000 from its operations and annually purchases goods valued between $30,000 and $35,000 from directly outside

the State of Missouri. The record further establishes that a substantial portion of Hospital Hill's gross revenues derives from Medicare and Medicaid payments as well as from privately administered national health insurance companies.

In Cedars-Sinai Medical Center, 223 NLRB 251 (1976), the Board found[4/] that residents, interns, and fellows are not "employees" within the meaning of Section 2(3) of the Act. That being so, Hospital Hill is not an "employer" within the meaning of Section 2(2) of the Act for the purpose of any disputes relating to such personnel.[5/]

Accordingly as the Petitioner seeks to represent only individuals who are not "employees" within the meaning of the Act, we shall dismiss the petition herein.

ORDER

It is hereby ordered that the peti-

tion filed herein be, and it hereby is, dismissed.

MEMBER FANNING, dissenting:

For the reasons set forth in my dissenting opinion in Cedars-Sinai, I would find the housestaff to be employees, and proceed to resolution of the other issues in this case.

Footnotes

1/The names of the Hospitals and the Petitioner appear as amended at the hearing.

2/Service Employees International Union was permitted to intervene solely on the issue of jurisdiction but has no interest in the petitioned-for unit.

3/Initially, about half of the residents and interns presently employed by Hospital Hill were formerly employed by Kansas City General Hospital and Medical Center (hereinafter referred to as General) and the Petitioner sought a single unit of residents and interns employed by Hospital Hill and General. However, the record established that as of July 1, 1975, General ceased to employ any residents and interns and that its residents and interns thereafter signed employment contracts with Hospital Hill. Accordingly, since none of the petitioned-for residents and interns are presently employed by General, we find it unnecessary, for the purpose of this proceeding, as acknowledged by the parties in their respective briefs, to reach or resolve the issues with respect to General's status as an employer within the meaning of the Act. For the same reason, we deny the request for decision on jurisdiction filed by General and Hospital Hill in which all other parties joined.

4/Member Fanning dissenting.

5/Our finding herein should not be construed as a determination that the Board would not find Hospital Hill to be

an employer within the meaning of the Act and within the Board's statutory and discretionary judgment for other purposes.

Hospital Hill contends, inter alia, that it is a joint employer with the University of Missouri, a political subdivision of the State of Missouri, in connection with the administration of Hospital Hill's residency program. Since we have found that the residents and interns at Hospital Hill are not "employees" within the meaning of the Act and have thus dismissed the petition for lack of statutory jurisdiction herein, we find it unnecessary, for the purposes of this proceeding, to consider or pass upon the joint employer issues raised by Hospital Hill.

APPENDIX X

Decisions and Orders of the NLRB
St. Clare's Hospital and Health Center

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. CLARE'S HOSPITAL AND
HEALTH CENTER

Employer

Case
2--RC--16760

and

THE COMMITTEE OF INTERNS
AND RESIDENTS

Petitioner

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held on various dates before Hearing Officer Robert Reisinger. Following the hearing and pursuant to Section 102.67 of the National Labor Relations Board Rules and Statements of Procedure, Series 8, as amended, and by direction of the Regional Director for Region 2, this case was transferred to the National Labor Relations

Board for decision. Thereafter, briefs[1/] were filed by the Petitioner and the Employer.

On September 3, 1975, the Board, having determined that this and a number of other cases in the health care industry presented issues of importance in the administration of the National Labor Relations Act, as amended, scheduled oral argument in several of these cases, including this one. Oral arguments were heard on September 8, 1975. Briefs amicus curiae were filed and have been duly considered.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

1. St. Clare's Hospital is a non

profit New York corporation engaged in providing health care for the public in New York City. The Employer has gross revenues in excess of $1 million in 1974 and during the same period made purchases of goods, supplied, materials, and services in excess of $50,000 directly from firms located outside the State of New York. The parties have stipulated and we find that the Employer is engaged in commerce. Accordingly, we find that it will effectuate the policies of the Act to assert jurisdiction herein.

2. For the purposes of this proceeding, we find that the Petitioner is not a labor organization within the meaning of the Act. In Cedars-Sinai Medical Center, 223 NLRB No. 57 (1976), we concluded, for the reasons stated therein, that medical residents, inter alia, are primarily stu-

dents, and are not "employees" within the meaning of the Act. In this proceeding, the medical residents whom Petitioner seeks to represent are essentially like those involved in Cedars-Sinai in terms of their relationship with the Employer. Accordingly, for the reasons set forth in the above-cited proceeding, we conclude that no question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act. We shall, therefore, dismiss the instant petition.

It is hereby ordered that the petition filed herein be, and it hereby is, dismissed.

Dated, Washington, D.C.
April 20, 1976

Betty Southard Murphy,
Chairman

Howard Jenkins, Jr.,
Member

John A. Penello,
Member

Peter D. Walther,
Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER FANNING, dissenting:

For the reasons stated in my dissenting opinion in Cedars-Sinai Medical Center, 223 NLRB No. 57, I dissent from the dismissal of this petition. Residents clearly perform a service for the training institution, for which they are compensated by that training institution. They are, therefore, employees, and the Petitioner is a labor organization.

Dated, Washington, D.C.
April 20, 1976

JOHN H. FANNING,
Member

NATIONAL LABOR RELATIONS BOARD

Footnote

1/With the Board's consent, the Association of American Medical Colleges, the Physicians' National House Staff, and the Coalition of American Public Employees submitted amicus curiae briefs, which have also been carefully considered.

St. Clare's Hospital and Health Center and The Committee of Interns and Residents, Petitioner. Case 2-RC-16760

May 26, 1977

ORDER DENYING MOTION

On April 20, 1976, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding[1/] which dismissed the representation petition on the ground that the Petitioner is not a labor organization within the meaning of the Act.

Thereafter, on April 27, 1976, the Petitioner filed a motion requesting the Board to reconsider its decision and requesting a rehearing before the Board. The Employer filed a letter opposing the motion. Thereafter, both parties filed supplemental statements of position.

The Board, having duly considered the matter, finds that the record, exceptions,

and statements of position adequately present the issues and positions of the parties. For the reasons stated below, we deny the motion.

The Committee of Interns and Resdidents (hereafter CIR) has elected to utilize this motion as a vehicle for questioning the preemptive effect of our decisions in Cedars-Sinai Medical Center[2/] and Misericordia Hospital Medical Center[3/] on the status of medical interns, residents, and clinical fellows (hereafter housestaff). Since the precise effect of the 1974 health care amendments on the status of housestaff apparently remains in a state of uncertainty, we shall attempt to clarify our view of the relevant legal principles.

After Congress deleted the statutory exemption of nonprofit hospitals from the National Labor Relations Act in 1974, this

Board began the delicate process of integrating the vital nonprofit hospital health care industry of approximately 1.4 million workers[4/] some 125 job classifications[5/] into the preexisting structure of the Nation's labor laws.[6/] The task was not an easy one, and at all times we were--and indeed still are--guided by an overriding desire to establish rational national labor relations policies for a multifaceted industry. In our first encounter with housestaff in Cedars-Sinai, we concluded that a petition which sought their representation did not raise a question concerning representation because members of the housestaff"although they possess certain employee characteristics, are primarily students."[7/] The CIR then sought to induce the New York State Labor Relations Board (hereafter NYSLRB) to resume its prior coverage of the housestaff.

This effort led to further litigation in the state and Federal courts.[8/] Meanwhile, in response to the efforts of the CIR, this Board instituted a Nash-Finch proceeding[9/] seeking to enjoin the NYSLRB from asserting jurisdiction over housestaff. The District Court for theSouthern District of New York subsequently declined to issue a Nash-Finch injunction because in the court's view there exists no national labor policy which requires that housestaff remain completely unregulated, and thus the exercise of state authority in that area is not preempted.[10/]

Both the New York litigation and Chairman Fanning's opinion herein reflect a fundamental misunderstanding of the policy considerations which underlie our conclusion in Cedars-Sinai that housestaff are "primarily students." Much of the blame for this misunderstanding can per-

haps justifiably be laid at our feet for we may not have been as precise as we might have been in articulating our views.[11/] This may merely be reflective of the fact that we do not view Cedars-Sinai as a monumental decision, but, whatever the cause, it is apparent that Cedars-Sinai has been viewed by many as an aberration in national labor policy, or, if not an aberration, at least the initial step in a new direction. Nothing could be further from the truth.

Cedars-Sinai is consistent with, and reflective of, longstanding national labor policy as developed and articulated by this Board. One common misconception surrounding Cedars-Sinai is that it is primarily a decision about the health care industry. This is just not the case--it is primarily a decision about the students, albeit students planning to enter the

health care industry. When viewed in terms of othe rBoard decisions involving students, it becomes evident that Cedars-Sinai is neither an aberration in national labor policy nor a precursor of things yet to come.

For purposes of analysis, Board precedent pertaining to students can conveniently be classified into four general categories. The first category consists of students employed by a commerical employer in a capacity unrelated to the students' course of study. As it is true in virtually all cases involving unit placement of students, a two-tiered approach is utilized. Initially, the Board applies its traditional community-of-interest standards to determine whether the interests of the students in their employment conditions are sufficiently aligned with those of nonstudent employees to

justify including both in a single bargaining unit. If the finding with respect to this primary issue is in the negative, and an alternative unit limited to students has been petitioned for, the second inquiry is whether a separate unit of students is appropriate. In analyzing these questions in cases falling within the first category, the Board has historically reached one of three results: (a) units that appropriately include both students and nonstudents,[12/] (b) units that include only students,[13/] and (c) situations in which students are not accorded bargaining rights at all because placement in either the (a) or (b) units would be inappropriate.[14/]

In considering the bargaining rights of students who work for a commerical employer in a capacity unrelated to their educational program, the significance of their status as "students" is necessarily

minimized. Such status is relevant only to the extent that it may affect traditional community-of-interest factors such as the amount or regularity of their hours of employment, expectancy of permanent employment, and in some cases the similarity of compensation and responsibilities with those of nonstudent employees. Thus, the status of such individuals as students is sufficiently remote from their employment interests so that, in terms of employment responsibilities, they are "primarily employees" rather than "primarily students," and accordingly our traditional community-of-interest stadanrds may be applied without modification in resolving unit placement issues.

A second category of Board decisions involving students is that in which the students are employed by their own educational institutions in a capacity unre-

lated to their course of study. In such cases, the Board has historically excluded the students from units which include non-student employees,[15/] and have not afforded them the privilege of being represented separately.[16/] The Board has reasoned that in these situations employment is merely incidental to the students' primary interest of acquiring an education, and in most instances is designed to supplement financial resources.

As in the first category, the students' motive for seeking employment cannot be deemed educational in the sense that it directly enhances their education, and thus in terms of their employment responsibilities they, too, must be considered "primarily employees." However, since their status as employees is in most instances directly related to their continued enrollment at the education insti-

tution, their relationship to the bargaining unit is normally viewed as transitory. It is primarily for this reason that the Board generally excludes students from bargaining units of full-time employees at their own educational institutions.[17/]

In yet a third category of cases, the Board has concluded that where a student is employed by a commerical employer in a capacity which is related to the student's course of study the student will be excluded from a unit of full-time nonstudent employees.[18/] This conclusion is based upon the fact that the commerical employer in these situations is acting as a surrogate for the educational institution, and thus, unlike the nonstudent employees, the students' interest in their employment is primarily educational in nature. Accordingly, the students' long-term interest in the employment relationship, including

wages, hours, and conditions of employment, is necessarily minimized.

The final category of cases is that in which students perform services at their educational institutions which are directly related to their educational program.[19/] In such cases, the Board has universally excluded students from units which include nonstudent employees, and in addition has denied them the right to be represented separately. The latter situation, of course, is precisely the one which has been raised by the petition herein.

The rationale for dismissing such petitions is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to--and indeed constitute an integral part of--their education program, they are serving primarily as students and not primarily as employees.[20/]

In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process. It is for this reason that the Board has determined that the national labor policy does not require--and in fact precludes--the extension of collective-bargaining rights and obligations to situations such as the one now before us.

It is important to recognize that the student-teacher relationship is not at all analogous to the employee-employer relationship. The former is predicated upon a mutual interest in the advancement

of the student's education and is thus academic in nature. The latter is largely predicated upon conflicting interests of the employer to minimize costs and the employees to maximize wages, and is thus economic in nature. This is, in our judgment, an extremely important distinction because the collective-bargaining process is itself fundamentally an economic process. From the standpoint of national labor policy, subjecting academic decisionmaking to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment. From the standpoint of educational policy, the nature of collective bargaining is such that it is not particularly well suited to academic decisionmaking. The inevitable change in emphasis from quality education to economic concerns

which would accompany injection of collective bargaining into the student-teacher relationship would, in our judgment, prove detrimental to both labor and educational policies.

The educational process--particularly at the graduate and professional levels--is an intensely personal one. It is personal not only for the student being educated, but also for the instructors whose responsibility it is to educate a large number of individuals possessing a variety of educational backgrounds and abilities. Collective bargaining on the other hand is, as its very name implies, predicated upon "collective" treatment for all who are represented, the very antithesis of personal individualized education.

In addition to being "collective," the bargaining process is also designed to promote equality of bargaining power, 21/

another concept largely foreign to higher education. While participatory education is on the rise, the student-teacher relationship is an inherently inequalitarian one, it being assumed that the teacher, by virtue of superior knowledge and experience, is in a better position to determine the most appropriate course of instruction and method of proceeding. In this respect, the teacher and student have a mutual interest in the advancement of the student's education. Such mutuality of goals rarely exists in the typical employment relationship, and goes far towards explaining why collective bargaining can flourish in one sphere while constituting an anathema in the other.

In addition to believing that collective bargaining is not adaptable to the structure of higher education, we also believe that there exists a grave danger

that it may unduly infringe upon traditional academic freedoms. Such freedoms encompass not only the right to speak freely in the classrooms, but also such fundamental matters as the right to determine course length and content; to establish standards for advancement and graduation; to administer examinations; and to resolve a multitude of other administrative and educational concerns. If one were to conclude that the student-teacher and employee-employer relationships were in fact analogous, then it would follow that many academic freedoms would become bargaininable as wages, hours, or terms and conditions of employment. Once this occurs, Board involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away.

The subject of hours, for example, is

of particular relevance when speaking of housestaff. Residents and interns work notoriously long hours. From a strictly educational standpoint, such hours may be necessary in order to provide the students with as broad an experience as possible. Also, it may be educationally desirable for a particular student not only to prepare the diagnosis of a patient, but to administer the treatment as well. Unfortunately, medical emergencies do not always conveniently occur between the hours of 9 a.m. and 5 p.m., Monday through Friday. Thus, the flexibility which medical educators need to schedule shifts, assignments, transfers, etc., in an educationally sound fashion could become bargainable should the housestaff be afforded collective-bargaining privileges.

Program advancement is another subject of academic concern which could be

affected by the advent of bargaining. Continuation in many graduate programs is dependent not only upon an assessment of a student's educational progress to date, but upon future potential as well. All such assessments are necessarily subjective and--particularly with respect to future potential--are not readily quantifiable. Were students deemed to be employees, the failure to recommend program continuation would be tantamount to discharge and thus a mandatory subject of bargaining. In all likelihood, a student protest over an unfavorable recommendation would end up before an arbitrator, with the arbitrator being asked to decide whether the subjective recommendation was academically justified--an issue not generally within the scope of most arbitrators' expertise.

In addition to those matters mentioned

above, other academic prerogatives such as examinations, grading, course content and materials, program duration, and teaching methods are likely to find their way eventually to the bargaining table. To the extent that this phenomenon limits the ability of students and faculty to tailor the instruction to their own individualized needs, the quality of the educational process is impeded thereby working not only to the detriment of the hospital and students, but ultimately to the detriment of public as well. We simply do not view such intrusions into traditional academic freedoms as being in the public interest.

In view of this analysis, it is perhaps somewhat easier to put our pronouncements in Cedars-Sinai Mecical Center[22/] and Kansas City General Hospital[23/] into their proper perspective. Our holdings therein did not constitute aberrations in

application of national labor policy nor indicate the striking out in a new direction. They were, instead, consistent with and reflective of established Board policy.[24/] Our conclusion that housestaff are "primarily students" rather than "employees" connotes nothing more than the simple fact that when an individual is providing services at the educational institution itself as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic. For the reasons stated above, we do not think that such a relationship should be regulated through collective bargaining. However, by our holding that housestaff are not "employees," we certainly did not intend to imply that we were thereby renouncing entirely our jurisdiction over such individuals.[25/] To the contrary, we have

indeed asserted jurisdiction over all classifications at health care institutions--including housestaff--but feel that extending bargaining privileges to residents interns and fellows would not be in the best interest of national labor policy. As we stated in Kansas City General Hospital, we have "not put hospital residents and interns beyond the rach of national labor policy but [have] rather held that to extend them collective-bargaining rights would be contrary to that very policy."[26/]

The conclusions which we have reached with respect to housestaff fall, in our view, well within the discretionary authority left to us by Congress in the 1974 health care amendments. The determinations that housestaff should not be afforded bargaining privileges was made in the course of fashioning appropriate

bargaining units for the entire health care industry. Congressional deference to our experience in such matters is reflected in the following remarks of Senator Williams:

> While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargaining units. [Emphasis supplied.]27/

With respect to housestaff in particular, Congress considered proposed amendments which would have made it clear that housestaff were not 2(11) supervisors. After noting favorably the manner in which the Board had applied Section 2(11) to health care professionals, Congress concluded that a specific amendment was unnecessary so long as the Board continued "evaluating the facts in each case in this

manner when making its determination."[28/] It is precisely this sort of factual analysis which has led us to conclude that not only are housestaff not supervisors, but the confluence of their institutional responsibilities and academic development also precludes the regulation of this relationship through collective bargaining.

Finally, we view our approach as being entirely considtent with the 1974 congressional mandate to develop a national approach to labor relations in the health care industry. With respect to the National Labor Relations Act in general, the Supreme Court has long recognized that "the broad powers conferred by Congress upon the. . .Board to interpret and to enforce the complex Labor Management Relations Act. . .necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be

permitted to operate."[29] More recently, the Court has recognized that a determination of Federal preeminence rests upon "a balanced inquiry into such factors as the nature of the federal and state interests in regulation and the potential for interference with federal regulation."[30]

That Congress conducted just such a "balanced inquiry" in passing the 1974 amendments is clearly evidenced by remarks made in both the House and Senate regarding a proposed amendment to the 1974 bill. The proposal, which was aimed specifically at a Minnesota statute, would have insured the continued viability of existing state regulation of health care institutions. The proposal was defeated for reasons articulated by Senator Taft:

> I think it is important, however, to have a national approach, in view of the problems we have had and that have varied widely trhough the country. There may be a very

> positive situation in the Senator's [then Senator Mondale from Minnesota] own State which does not indicate at the present time any need for a national law, but I think on balance a national approach is desirable.31/

Accordingly, it is apparent to us that the congressional mandate which has existed ever since 1935 to fashion national labor policies for certain industries was expanded in 1974 so as to encompass the health care industry. It was pursuant to the discretionary authority subsumed in that mandate that we found the interests of housestaff in their institutional responsibilities to be academic in nature. In light of this finding, we examined past precedent and concluded that consistent therewith collective bargaining should not be applied to what is fundamentally an educational relationship. We do not view these findings and conclusions to be either aberrations in an otherwise uniform na-

tional labor policy nor in excess of our congressionally mandated authority.

It is hereby ordered that the Petitioner's motion for reconsideration and rehearing be, and it hereby is, denied as lacking in merit.[32/]

MEMBER JENKINS, concurring:

I concur, on the basis of Cedars-Sinai and Kansas City General Hospital, in the result reached by the majority, but in very little of their additional reasoning. They have failed to distinguish between students employed by their schools, whom we exclude from units of nonstudent employees on community-of-interest grounds, and students who may be attending classes while working elsewhere, as to whom their studies are no ground for special treatment. This basic misunderstanding leads the majority into erroneous reasoning and a seeming willingness to regard any em-

ployees who also engage in structured studies as per se being somehow and in some respects disqualified from union representation. Because I disagree wholly with this view, it is necessary that I disassociate myself from the majority decision, except in result.

CHAIRMAN FANNING, dissenting:

As I read today's majority opinion, the "fundamental misunderstanding" of Cedars-Sinai Mecical Center, supra, on the part of Judge Gellinoff,[33/] Judge Stewart,[34/] and myself,[35/] is that we do not preceive that Cedars was, indeed, based upon "longstanding policy" considerations denying to particular students representation rights under this statute. Probably, we are told, part of our problem was my colleagues' failure to be as "precise" as they might otherwise have been in setting forth those "policy" con-

siderations. No doubt, this latter admission is offered to explain why neither the word "policy" nor a single case citation was utilized in the Cedars majority opinion. But, it is more notable, as a comment on the quality of what is offered today as the first explication of those "policy" considerations, that the majority opinions which "revise," "amend," or "clarify" Cedars are related exclusively to Federal court litigation which does not raise the specific issue posed by Cedars. Cedars itself dealt only with the question whether housestaff officers should be covered under the statute. The "explanatory opinions," Kansas City General Hospital (Revised)[36/] and the instant Order Denying Motion, are directed solely to a completely different issue--whether state regulation of housestaff activity is, in light of Cedars-Sinai, precluded

by virtue of the preemption doctrine. It is, I think, a somewhat Procrutean jurisprudence to be fitting Cedars-Sinai to he bed of the Federal court litigation. It is also an empty jurisprudence to do so without explaining, to this day, why stripping housestaff officers of any rights (and responsibilities) they may have had even before the amendments is conducive to the harmonzing of Federal-state interests. But that refusal might be "explained," if not justified, by a congressional desire, expressed in the legislative history of the statute, and in its very language, to foreclose the creation of a jurisdictional no-man's land.[37/] And it is clear that a no-man's land has, despite the majority's mere assertion to the contrary, been created here.[38/] Those more disposed towards rationalizing may attribute my colleagues'

preemption position to a possible perception that Federal regulation of some hospital employees (the nonhousestaff kind) cannot exist alongside state regulation of other hospital employees (housestaff). But our experience with agricultural employers and all their employees, both those engaged in the agriculturally related functions and those not (e.g., a winery's office clericals), sufficiently undermines that notion.

It is easy, then to become confused, even mystified,[39/] by what my colleagues have thus far wrought in the saga of Cedars-Sinai. I still do not, for example understand exactly what my colleagues mean when they state that Cedars was, for them, just a case "about students at academic institutions" and not a "decision about health care institutions." If that is true, it strikes me as their first

mistake. The particular role of house-staff in our health care delivery system is certainly worthy of greater attention than such a conception of what is involved in Cedars would seem to account for. A strike by research assistants at a university does not, in all candor, rise to the level of significance the health care amendments attribute to a strike by doctors. I do not, of course, wish to even intimate that the former is not a matter of concern in our national labor policy, but it is unmistakable, I think, that the process by which the amendments came to be did not contemplate the Agency entrusted with administration and enforcement of the amendments deciding the propriety of a recognitional strike by doctors via application of Board policies related to educational institutions. In this regard, it may be noteworthy that

housestaff, if indeed "students," are unlike any others and that the hospitals at which they work, if indeed "educational institutions," are unlike any others. The former proposition is self-evident, I submit. I am not aware of any of the "students" in the cases to which my colleagues allude having, for but one example, legal authority to make incisions in other human beings. The denomination of institutions involved as "educational" is equally inappropriate. All of the educational facilities found in the cited cases, unlike all of the hospitals found in the housestaff cases, were incorporated under applicable state education laws. Of course, that they were merely reflects that the State, as well as the legislative history of the amendments, which at no point, as far as I can find, referred to any "educational" institutions being

added to Board jurisdiction, discerned the obvious differences between universities and hospitals.

So, in this sense, if my colleagues did, in fact, conclude that Cedars lent itself to application of Board "policy" towards "students at academic institutions," they were, I think off to a dubious start.

The precise statutory status of the housestaff is equally confusing to me. In Cedars they stated, in response to my reference to Macke II,[40/] which I shall discuss shortly, that housestaff were "students rather than employees."[41/] And that is, I might add, the way Judge Gellinoff and Judge Steward read Cedars, namely, that the Board had found housestaff to be "nonemployees."[42/] The majority has also uniformly found the organizations which seek to represent housestaff not to be

labor organizations under Section 2(5).

Today, as I read the majority opinion, my colleagues at times intimate that, all along, they really "meant" to find housestaff a particular kind of employee, the "student-employee," and that Cedars was simply intended to be a decision which emphasized the "student" aspect of that term. It is, of course, legitimate to question why the majority, if this interpretation is the one they seek, has not, in consequence, retracted its finding of the nonlabor organization status of CIR, since obviously, if a housestaff member is a kind of employee denied coverage solely because of the purported unavailability of an appropriate unit which could encompass him or her, that fact would not, in the least, detract from the labor organization status of the would-be representative. It is equally legitimate to specu-

late whether this entire "clarification" is more the result of a perception of the necessities of Federal court litigation than a perception of Cedars' potential for confusion.[43/] But, rather than unduly speculate on the true significance of some of the subtle shifts in emphasis evinced by my colleagues' latest attempt to clarify Cedars, it is perhaps best to proceed to the more substantive frailties of the latest "clarification" assuming that Cedars does, indeed, lend itself to description as a case "about students at academic institutions," and that Cedars did, indeed, hold that housestaff were "student-employees" and not "nonemployees."

Engaging in these assumptions does not, however, help the majority's case, for a simple reason. Although the outline which the majority superimposes upon Cedars is "convenient," almost impressive,

it has one fatal deficiency, enough to compel my colleague Member Jenkins, to part company with today's decision. The Board "policy" to which the majority alludes does not, so far as is relevant here, exist. That is to say, there is not, nor has there ever been any "long-standing policy" which denies representation rights completely to "students" who are also "employees" within the meaning of Section 2(3).

That my colleagues contend otherwise is simply reducible to the consistency with which they equate denying a student-employee inclusion in a particular bargaining unit composed of other "employees" who are not students with the "denial of representation rights completely" the former denial is supposed to evidence. That simply and incontrovertibly is not the case.

In, for example, the majority's "first category" of students, those "employed by a commerical employer in a capacity unrelated to the student's course of study," the majority opinion cites several cases which assertedly support the proposition that the Board "historically" has refused to "[accord] bargaining rights at all" to certain students in this category. The first three cases, Giordano Lumber,[44/] Post Houses,[45/] and Crest Wine,[46/] however, merely denied, respectively, one temporary employee, several seasonal employees, and one casual employee inclusion in a broader unit with nonstudent employees. In fact, in Giordano Lumber, three students were included in the broader unit because they were found not to be temporary employees. Clearly, the fact that the excluded individuals were students was essentially irrelevant. It was their temporary, sea-

sonal, or casual status which caused their exclusion, status they could just as easily have had whether or not they were students. Just as significantly, if we are, as my colleagues would have it, to believe that Cedars' foundation was built on analogy to cases involving "students," the proper student cases to allude to would be those which involved (a) students who were regular full-time or part-time employees, and (b) a request for the separate representation of these students (since the housestaff unit is composed exclusively of individuals the majority denominates students). The only cited case in this category which fulfills these necessary requirements is Saga Food Service,[47/] a case so "historically" rooted in "Board policy" that it arose only 3 years ago and was not followed in a case decided 6 months later, Macke II,[48/] where the Board

authorized an election in a group composed exclusively of the students found to have no community of interest with the nonstudent employees of The Macke Company, 211 NLRB 90 (1974).

The little attention paid, in the majority opinion, to both the requirements of analogy and the detail of cases is best exemplified by the analysis undertaken in the "second category" of students. The "historical" denial of any form of representation rights for students in this category is, we are told, a proposition supported by reference to a lone case, San Francisco Art Institute,[49/] which issued after Cedars-Sinai. Although Member Jenkins[50/] and I dissented in San Francisco Art, I do not choose to restate why I believe that case was incorrectly decided. I am willing to assume, for present purposes, it was not. But it does strike me

as jurisprudentially unsound to cite, in support of the argument that Cedars was based upon some "longstanding policies" towards "students," a case that issued after it! But even to accept the disposition in San Francisco Art, to accept its citation today, and to assume Cedars itself was not the prime mover in that decision, it was a case, as the majority there stated, "influenced. . .chiefly by":

> ... the brief nature of the students' employment tenure, by the nature of compensation for some of the students, and by the fact that students are concerned primarily with their studies rather that with their part-time employment. In our view, the [students involved] are best likened to temporary or casual employees.

Not one of those factors is present in the case of housestaff. Of equal significance is how the majority itself, in that case, framed the issue in cases involving requests for the separate representation of student-employees: "resolu-

tion. . .turns on whether the [students] manifest a sufficient interest in their conditions of employment to warrant representation in a separate unit." If that is the majority's own test, they could not possibly have applied it in Cedars to dismiss the petition filed there or to deny this motion for reconsideration.

With regard to the so-called "Board policy" towards students in the majority's fourth category,[51/] where the majority places housestaff, we can, since it is the question to be answered, dismiss the majority's citation of Cedars in support of the "policy" described. With Leland Stanford Junior University[52/] on the other hand, some familiarization, it seems once again,[53/] is necessary. The issue in Leland Stanford was, to state the matter in its clearest terms, whether all "work" is the kind of "work" employees as that

term is used in the Act, perform. Cornell University, amicus there, questioned, for example, whether the term "employee" in Section 2(3) should be interpreted so broadly as to encompass, in that case, individuals who did not work for anyone but themselves, subject to no one's control but their own. The research assistants at Stanford were, unlike housestaff who are, in the classic sense, "employees," the classic students who characterized, as we all have, schoolwork as their "work." To the extent the majority characterizes my disagreement with their analysis of Leland Stanford as evolving from some misconception on my part of the relevance of the "nature of the work" performed by the research assistants, they are, I am convinced, evading my point. Plainly, it was not the nature of the work of the research assistants which prompted the dismissal of the

petition in Leland Stanford, but, rather, the absence of work in their duties, at least as the term is used in the classic definition of "an employee"--one who works for another subject to the latter's control, for which work compensation is given.[54/] The case is, in this regard, totally distinguished from Adelphi University,[55/] the final case cited by the majority in this "category." In Adelphi, as in most of the cases cited throughout the majority's outline of "student cases," the graduate assistants were not found to be "students rather than employees," and were not "denied representation rights completely." They were, as that decision makes quite clear, found to have no community of interest with other employees in the unit fashioned.[56/]

Under a more precise analysis, one which does not gloss over the differences

between individuals who are "temporary" or "casual" employees and those who are not, one which does not gloss over the substantial difference between denying an individual inclusion in a particular unit on community-of-interest bases and "denying the individual representation rights completely," it is clear that Board policy toward students is more properly set forth as being concerned with (a) whether the student fits the definition of employee (e.g., Leland Stanford); (b) if he or she does whether that student is a temporary, seasonal, or casual employee, as opposed to a regular employee of either full- or part-time status; and (c) if the latter, whether that student enjoys a sufficient commonality of working interests justifying his or her inclusion in the same unit with other employees. Of all the cases cited today by my colleagues in the majority only

three are remotely (and that is all relevant to the issue presented by Cedars, even if we were to accept the Cedars majority's finding that housestaff are "students rather than employees"); Leland Stanford, which found the students nonemployees; Saga Food Service, which found the students employees but not entitled to coverage; and Macke II, which retreated from the holding in Saga Food soon after the latter's issuance. If Leland Stanford is the basis for Cedars, the majority misapplied the facts of Cedars, for, surely, housestaff "work," as that word is traditionally understood, for the hospital, for which they receive taxable income. Just as significantly, for today's purposes, if Leland Stanford is assumed to be proper basis for Cedars itself, the the majority's preemption argument necessarily fails, for the Board, by its own holding, has no jurisdiction over

the nonemployee housestaff member. Finally, if Saga Food is the basis for Cedars, the Board, in effect, overrules Macke II. And the stipulated nature of the petition in Macke II has nothing to do with its applicability to Saga Food. No party can stipulate to this Board's subject matter or legal jurisdiction. If the individuals encompassed by a petition are "independent contractors," or "supervisors," or "agricultural workers," no stipulation can legally overcome that jurisdictional defect.

That my colleagues are willing to go to the lengths they have not only to deprive housestaff of their rights under this statute, not only to deprive the States of their right to regulate in the void created by this Board, but, in the latter effort, to so distort 40 years of Board precedent[57/] (for surely this deci-

sion will have ramifications far beyond the housestaff question), is, indeed, an "aberration." Perhaps they believe that the successful litigation of their preemption position will, despite its obvious drawbacks,[58/] despite the violence to our precedents that effort requires, alleviate the justifiable criticism[59/] Cedars has generated. They are, I think, mistaken. In the final analysis it is the height of absurdity for Congress to enlarge this Board's jurisidiction, to encompass the vast bulk of health care institutions in this country for the avowed purpose of minimizing the potential disruptions of health care delivery posed by organizational efforts of individuals not covered by Federal regulation until the amendments, and then, for this Board, upon some notion that the decisional basis for the question of coverage is found in "precedent" involv-

ing student janitors,[60] science graduate assistants,[61] and physics majors,[62] to leave without regulation those in the forefront of organizing activity in the health care field, doctors. And, as Judge Stewart indicated in his opinion,[63] the recent strikes at various New York City hospitals are the direct result of Cedars. They were also completely incompatible with the amendments and precisely the threat sought to be cured.

I would, therefore, grant the motion for reconsideration, not because of the movant's allusion to the possible preemptive impact of Cedars-Sinai, for I do not believe Federal preemption can or should be sustained here. But the error of Cedars-Sinai is, perhaps, best exemplified by the majority's tortuous efforts in subsequent cases, like this one, to give it meaning. I would grant the motion for

reconsideration to give my colleagues the needed opportunity to start all over again.

Footnotes

1/223 NLRB 1002 (1976).

2/223 NLRB 251 (1976).

3/224 NLRB 865 (1976).

4/120 Cong. Rec. S12103 (July 10, 1974) (remarks of Senator Williams).

5/Hearings Before the Special Subcommittee on Labor of the Committee on Education and Labor, HOuse of Representatives, 93d Cong., 1st Sess. on H.R.1236 at 92, 97 (1973).

6/For a balanced discussion concerning the effects of the amendments, see Health Care Bargaining: A Symposium, 1 Employee Rel. L. J. 389 (1976).

7/223 NLRB 251.

8/For a comprehensive summary of the New York litigation, see N.L.R.B. v. Committee of Interns and Residents, 426 F.Supp. 438 (D.C.N.Y. 1977).

9/See N.L.R.B. v. Nash-Finch Co. d/b/a Jack & Jill Stores, 404 U.S. 138 (1977).

10/N.L.R.B. v. Committee of Interns and Residents, supra.

11/Member Murphy is sympathetic to Member Jenkins' concurrence because she agrees that the decisions in Cedars-Sinai and Kansas City General Hospital and Medical Hospital Hill Health Services Corporation, 225 NLRB 108 (1976), adequately set

forth the Board's reasoning. However, under the circumstances of this case, she joins the majority herein.

12/See, e.g., Pittsburgh Metallurgical Company, Inc., 95 NLRB 1 (1951); Burrows & Sanborn, Inc. 84 NLRB 304 (1949); Gruber's Super Market, Inc., 201 NLRB 612 (1973); Fairfax Family Fund, Inc., a wholly owned subsidiary of Spiegel, Inc., 195 NLRB 306 (1972); Hearst Corporation, San Antonio Light Division, 221 NLRB 324 (1975).

13/See, e.g., Six Flags Over Georgia, Inc., 215 NLRB 809 (1974); The Marke Company, Case 2-RC-16725 (1975) (not reported in Board volumes). Chairman Fanning makes much of the fact both here and in Cedars-Sinai that the Board approved a stipulation of the parties in Macke for an election in a unit limited to students working in the cafeterias of Fairfield University. Aside from the fact that additional considerations become operative when the parties stipulate to the appropriateness of a particular unit (see, e.g., Otis Hospital, Inc., 219 NLRB 164 (1975)), and noting that the majority did not concede the relevance of Macke in Cedars-Sinai, the students in Macke were not employed by their educational institution, but rather by a private corporation. Accordingly, the difficulties attendant to the application of collective bargaining to an educational rather than economic relationship which underscore our decision in Cedars-Sinai were just no present in Macke.

14/See, e.g., Giordano Lumber Co., Inc., 133 NLRB 205 (1961); Post Houses, Inc., 161 NLRB 1159, 1171-72 (1966); Crest

Wine and Spirits, Ltd., 168 NLRB 754 (1967); Saga Food Service of California, Inc., 212 NLRB 786 (1974): Lake City Home for the Aged, Inc., d/b/a/ Shady Oaks, 229 NLRB 54, fn. 1 (1977).

15/See, e.g., The President and Directors of Georgetown College for Georgetown University, 200 NLRB 215 (1972); Cornell University, 202 NLRB 290 (1973); Barnard College, 204 NLRB 1134 (1973).

16/San Francisco Art Institute, 226 NLRB 1251 (1976).

17/Chairman Fanning implies that we can derive no direct support for our decision in Cedar-Sinai from San Francisco Art Institute, supra. This is literally true because, as we indicate below, a very different situation is presented when students perform services for their educational institution as part and parcel of their academic development. However, the Chairman miscontrues our purpose. We are not here seeking to establish direct support for our decision in Cedar-Sinai, but rather refer to San Francisco Art Institute to demonstrate that our analysis in Cedars-Sinai, which focused upon the nature of the relationship betwenn the students and the institution for which services were being performed, is identical to the analysis historically utilized by the Board in all cases involving unit placement of students.

18/See, e.g., Pawating Hospital Association, 222 NLRB 672 (1976); Highview, Incorporated, 223 NLRB 646 (1976); Colercraft Mfg. Co., Inc., 162 NLRB 680, 688 (1967).

But see Dorance J. Benzschawel and Terrence D. Swingen, Co-Partners, d/b/a Parkwood IGA Foodliner, 210 NLRB 349 (1974).

19/Cedars-Sinai Medical Center, 223 NLRB 251 (1976); The Leland Stanford Junior University, 214 NLRB 621 (1974); Adelphi University, 195 NLRB 639 (1972).

20/Chairman Fanning attempts to undermine our reliance upon The Leland Stanford Junior University, supra, by arguing that it was the nature of the work being performed by the research assistants in that case--not their status as students--which prompted dismissal of the petition therein. This is simply not the case as evidenced by the Board's comparison of research assistants and research associates. Both the assistants and the associates, as their titles sugges, engaged in research. Thus, the nature of their "work" was identical. However, the Board contrasted the assistants with associates by observing that the status of assistants was

> ... a situation of students within certain academic guidlines having chosen particular projects on which to spend the time necessary, as determined by the project's needs. The situation is in sharp contrast with that of research associates, who are full-time professional employees who have already secured their Ph.D. degrees and work at research under direction, typically of a faculty member. Research associates are not simultaneously students, and the

> objective of a research associate's research is to advance a project undertaken by and on behalf of Stanford as directed by someone else.... In contrast, the RA's are seeking to advance their own academic standing and are engaging in research as a means of achieving that advancement....

This distinction led the Board to conclude that the

> ... research assistants are like the graduate teaching and research assistants who we found were primarily students in Adelphi University 195 NLRB 639, 640 (1972). We find, therefore, that the research assistants in the physics department are primarily students, and we conclude they are not employees within the meaning of Section 2(2) of the Act. Accordingly, no question affecting commerce exists concerning the representation of "employees" of the Employer within the meaning of Section 9(c)(1) of the Act, and we shall dismiss the petition herein.

21/29 U.S.C. §151. See, generally, Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1407 (1958).

22/See fn. 2. supra.

23/See fn. 11. supra.

24/It is important to reiterate that Cedars-Sinai was and is "consistent with and reflective of" established Board policy--not necessarily "dictated by" that policy. Most of Chairman Fanning's dis-

senting opinion is devoted to pointing out the factual differences between Cedars-Sinai and the cases which we have grouped into the first three categories. We quite agree that those cases are factually distinguishable--hence the four separate categories. We note also that the instant case is factually distinguishable in that the instant case is factually distinuishable in that the "work" of the housestaff personnel constitutes their course of study and to this extent is analogous to Leland Stanford. We fear, however, that the Chairman has lost the forest for the trees, because, irrespective of the factual novelty of Cedars-Sinai, the essential point remains that the legal analysis utilized by the majority in that case is identical to that which the Board has historically utilized in all cases involving students.

25/Member Murphy notes that at the time of the Decision and Order issued in Cedars-Sinai Medical Center, supra, she did not intend that the Board preempt the field insofar as Federal labor policy might apply to interns and residents, but she has now been persuaded by her colleagues that this was the effect of the 4-to-1 majority holding therein.

26/225 NLRB 108 (1976). Since we have not renounced jurisdiction over housestaff we have not, as Chairman Fanning suggests, created a "no-man's" land.

27/120 Cong. Rec. S12104 (July 10, 1974).

28/93d Cong. 2d Sess., S. Rep. 93-766 at 6 (1974).

29/Vaca v. Sipes, 386 U.S. 171, 178-179 (1967), quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242 (1959).

30/Farmer v. United Brotherhood of Carpenters and Joiners of America Local 25, 430 U.S. 290, 300 (1977.

31/120 Cong. Rec. S6942 (May 2, 1974).

32/Member Walther finds no merit in the contentions either that he disqualify himself from participating in this proceeding or that he improperly participated in the original decision herein, for the reasons set forth by him in the Board's Order Denying Motion in Cedars-Sinai Medical Center, 224 NLRB 626 (1976).

33/Committee of Interns and Residence v. New York State Labor Relations Board, 94 LRRM 2081, 79 LC ¶11, 710 (N.Y.S. Ct., 1976). In direct response to this opinion and its possible impact, by virue of its logic, on this Board's attempt to preclude any state regulation of hoursestaff that may have been resuscitated by Cedars-Sinai, this Board simply "revised" a decision upon which Judge Gellinoff had relied to find Federal preemption could not be sustained under Cedars-Sinai, as it read. The case, Kansas City General Hospital, 225 NLRB at 110, made the logical observation that since housestaff were "not employees" (it did not say "student-employees" or "a particular kind of employee") the hospital there involved was not their "employer" within the meaning of Sec. 2(2) of the Act. If, of course, the hospital was not a statutory employer the preemption argument could not be made, so, 6 months later,

and 11 days prior to the filing of the Federal district court suit, my colleagues, sua sponte, "revised" Kansas City General to strike that language. The revised decision is cited at 225 NLRB 108. See my dissenting opinion there.

34/N.L.R.B. v. Committee of Interns and Residents, 426 F.Supp. 438 (D.C.N.Y. 1977). It is not my intention to engage in a lengthy comparison between this decision and today's majority opinion. That the latter is a direct response to the former will become clear to those willing to compare, in detail, the two. Compare, e.g., 1000-1002, supra, with 426 F.Supp. at 452; 1003-1004, supra, with id. at 449-450; 1004, supra, with id. at 453. Unlike all the other denials of motions for reconsideration of Cedars-Sinai-based dismissals, which issued with a fairly uniform celerity, this one issues 1 year after it was filed. Today's majority opinion, then it should be clear, amounts to the resurrection of the Kansas City II technique. See fn. 33, supra.

35/See my dissenting opinions in Cedars-Sinai, 223 NLRB 251 (1976); Kansas City General (Revised), supra.

36/See fn. 33, supra.

37/Basic to the majority's Federal preemption argument is Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947), which Judge Stewart found inapplicable to the Cedars-Sinai situation. See his opinion at 426 F.Supp. 449-450. But it is commentworthy (and without suggesting that it is no longer

viable) that Bethelhem was decided prior to Taft-Hartley's elimination of the particular policy problem out of which it arose whether "foremen" were more akin to "supervisors" or "employees" under the statute. More significantly, it was decided prior to Landrum-Griffin and the enactment of Sec. 14(c)(2). Although that section, by its language, is restricted to permitting, with proviso, States to assume that jurisdiction the Board declines to assert because of the failure of the employer to reach our discretionary jurisdictional dollar-amount standards, the Landrum-Griffin history points unmistakably to the conclusion that Sec. 14 (c)(2) was thought to be the total demise of the jurisdictional no-man's land the Board, here, seeks to create. The historical forces at work on Bethelhem's applicability here probably account for the fact that the Supreme Court has not cited in over 14 years, as far as I can determine, see Colorado Anti-Discrimination Commission v. Continental Air Lines, 372 U.S. 714, 724 (1963), and then for a proposition which undermines my colleagues' argument. They probably also account for the fact that Bethlehem is not mentioned in the "watershed" preemption case, San Diego Building Trades nouncil v. Garmon, 359 U.S. 236 (1959), nor in the two cases which authoritatively trace the development of the preemption doctrine. Local 76, International Association of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission 427 U.S. 132 (1976), and Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge, 403 U.S.

274 (1971).

38/If the housestaff do not fall within the ambit of Sec. 2(3) and CIR is not a 2(5) labor organization, as the majority has consistently found in every housestaff case to come before this Board, the Board has no jurisdiction over the subject matter. The only conceivable explanation for my colleagues' contrary view that jurisdiction still resides is that the majority must believe it retains jurisdiction to continually deny housestaff are covered by Act. Of course, the necessities of administration and reasons itself dictate that all judical bodies have sufficient, if sometimes temporary, jurisdiction to decide whether subject matter jurisdiction does, in fact, exist. But it is patently frivolous to contend that subject matter jurisdiction having been found lacking amounts to continuing jurisdiction.

39/Hearings Before Subcommittee on Labor, Committee on Education and Labor, House of Representatives, Oversight Hearings on the National Labor Relations Act Procedures and REmedies (March 31, 1976) (remarks of Rep. Thompson):

> I was the author of that legislation which was cosponsored by a number of my colleagues, supported by our ranking minority member...and carried overwhelmingly. We never dreamt that this interpretation, such an interpretation would follow from our deliberations or the hearings or any other factor...it was clearly and absolutely not the intention of the author...its sponsors and nowhere in

> the...legislative history is it indicated that interns and residents are to be considered as students...when it came down it amazed me, amazed my counsel, amazed anyone who had an association with the legislation.

40/The Macke Company, Case 2-RC-16725 (not reported in volumes of Board Decisions).

41/223 NLRB at 253.

42/See Committee of Interns and Residents v. N.Y.S.L.R.B., 94 LRRM at 2082, 79 LC ¶11, 710; N.L.R.B. v. Committee of Interns and Residents, 426 F.Supp. at 448-449.

43/See fn. 58, infra. See also Martin v. Roosevelt Hospital, 426 F.2d 155, 158 (C.A.2, 1970).

44/Giordano Lumber Co. Inc., 133 NLRB 205 (1961).

45/Post Houses, Inc., 161 NLRB 1159 (1966).

46/Crest Wine and Spirits, Ltd. 168 NLRB 754 (1967).

47/Saga Food Service of California, Inc., 212 NLRB 786, fn. 9 (1974).

48/I referred my colleagues to Mack II in Cedars-Sinai (see 223 NLRB at 254. fn.5) and they conceded its applicability. (See Cedars-Sinai, supra at 253: "Our dissenting colleague has misconstrued the basis for our decision. We are aware that the

Board has included students in bargaining units and, in a few instances, has authorized elections in units composed exclusively of students." (Emphasis supplied.) The language of this statement makes it clear that it was offered in response to my reference to Macke II.). The only logical explanation for the inconsistency between the quoted statement and the entire approach taken in today's decision is that the majority realize it found housestaff to be nonemployees in Cedars, realized what that holding would mean in terms of its preemption argument, and, to save its preemption position from defeat, decided to change the basis for Cedars.

49/226 NLRB 1251(1976).

50/As previously indicated, Member Jenkins through a member of the majority in Cedars and Kansas City General Hospital II, does not join the remaining Board Members in their attempt to create a Board "policy" of total exclusion with regard to certain kinds of student-employees. No doubt, that Member Jenkins' involvement with the shaping of Board "policy"is more extensive, in terms of tenure, than any other Board Member's in the history of this Agency, save mine has something to do with this. Like my colleague, I, too, cannot recall how this particular policy about "students" came to be.

51/Strangely, although a policy of total exclusion can purportedly be found in Board cases in the first, second, and fourth "categories" provided by the majority today, apparently none can be found in the third. Considering that the only differ-

ence between the first and thrid categories is that the student in the latter is engaged in a capacity related to his or her course of study, one would think a case or two might be cited in the third category to support occasional "total exclusions." Of course, the answer to this problem is gleaned from the fact that no Board case, up to an including Cedars, can be found where the majority's "categorical" breakdown is even referenced.

52/214 NLRB 621 (1974).

53/See fn. 14 of my dissent in Cedars-Sinai. The reader will note that Leland Stanford, the supposed partial basis now for Cedars, was never mentioned by the majority in Cedars, despite the fact I discussed it at length in response to the references to it at oral argument.

54/See my dissent in Cedars at 254-255, for a discussion of the definition of "an employee" as used in the Act. In Leland Stanford, the Board stated "[T]he relationship of the RA's [the research assistants, as opposed to the research associates found to be statutory employees] and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer." 214 NLRB 623 (1974). See also my discussions of Leland Stanford in Cedars, at fn. 14.

55/195 NLRB 639 (1972).

56/See, e.g., id at fn. 8.

57/As I understand the majority's fn.

24 my colleagues would have us believe that, while there is no "precedent" as such for Cedars, the kind of "legal analysis" undertaken in past cases was followed in Cedars so that it, at least is "consistent with and reflective of Board policy" as demonstrated by those earlier cases. It is a matter of "legal analysis," we are told. But what kind of "legal analysis" is it which characterizes finding certain individuals, let us say, temporary employees as but a mere "factual difference" between the case making that finding and Cedars. Do not factual differences bear upon legal analysis? Are they not, indeed, the very substance of legal analysis? Is it a "factual difference" to point out that the majority blithely equates denying an individual inclusion in the same unit with other employees with denying that individual "coverage under the Act"? Clearly, today's effort is an attempt to confuse. If it were not, the majority would be willing to answer, straightforwardly, the question: are you holding housestaff officers to fall outside the definition of "employee" found in Sec. 2(3) of the Act? My colleagues in the majority know the impact an affirmative answer to that question will have on their preemption appeal. They also know the impact a negative answer will have on the district court action instituted by CIR seeking the overturning of Cedars itself. And a point where the "failure to be precise" becomes an embarrassment. And writing decisions to limit one's embarrassment is not an enviable example of jurisprudence.

58/If the housestaff are simply "not statutory employees," the Board has no

jurisdiction over them. If they are students who also happen to be employees, there is no policy of denying them coverage. Even if there were, it would be a Board policy and must give way to the congressional policy found in the amendments. If my colleagues can assume the question of coverage was left to theBoard's "discretion" (it may have been left to informed discretion, but no less--see Cedars at 254, et seq.) preemption still does not follow every time the Board exercises some "discretionary" exclusion. See, e.g., Hanna Mining Company v. District 2, Marine Engineers Beneficial Association, 382 U.S. 181 (1965). See finally fn. 37, supra.

59/See fn. 39, supra. Not even the AMA, the ultimate governing authority for housestaff programs in this country. believes Cedars was correctly decided. It has testified before Congress urging that it be overruled. See Hearings on H.R.2222, Before the Subcommittee on Labor-Management Relations, House of Representatives (April 4, 1977)(remarks of Dr. Mangold).

60/San Francisco Art Institute, supra.

61/Adelphi University, supra.

62/Leland Stanford Junior University, supra.

63/N.L.R.B. v. Committee of Interns and Residents, 426 F.Supp. at 453.

APPENDIX XI

Complaint
and
Exhibits 6 and 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

----------x

PHYSICIANS NATIONAL HOUSE
STAFF ASSOCIATION,
1625 L Street, N.W.
Washington, D.C. 20036
(202) 452-0081,

and

CEDARS-SINAI HOUSE STAFF
ASSOCIATION,
8700 Beverly Boulevard
Los Angeles, California 90048,
(312) 947-1000,

and

UNIVERSITY OF CHICAGO HOS-
PITALS AND CLINICS HOUSE
STAFF ASSOCIATION,
950 East 59th Street
Box 488
Chicago, Illinois 60637,

and

ST. CHRISTOPHER's HOSPITAL
HOUSE STAFF ASSOCIATION,
2600 North Lawrence Street
Philadelphia, Pennsylvania
19133,
(215) 427-5000,

and

CIVIL
ACTION
No.77-0358

Flannery,J.

THE COMMITTEE OF INTERNS AND RESIDENTS,
666 Third Avenue
New York, New York 10017
(313) 697-7600,

Plaintiffs,

-against-

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN A. PENELLO, PETER D. WALTHER, and JOHN H. FANNING, individually and as Chairman and Members of and constituting the National Labor Relations Board,
1717 Pennsylvania Avenue, N.W.
Washington, D.C., 20570
(202) 254-9200,

Defendants.

----------X

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

The plaintiffs allege as and for their complaint as follows:

Preliminary Statement

1. This complaint is filed by the plaintiffs for the purpose of having this Court: (i) declare and adjudge the plain-

tiffs as labor organizations, and the persons represented by plaintiffs as employees within the meaning of and under the Labor Management Relations Act of 1947, as amended (29 U.S.C. 151, et seq.) (hereinafter "the Act"); (ii) vacate, annul and set aside the determinations of the defendants wherein they have failed, neglected, and refused to assume and exercise jurisdiction, as required by the Act, over the plaintiffs as labor organizations and the persons represented by the plaintiffs as employees under the Act; and (iii) compel the defendants to assume and exercise jurisdiction, as required by the Act, over the plaintiffs as labor organizations and the persons represented by plaintiffs as employees under the Act.

Jurisdictional Statement

2. This action arises under the Constitution and statutes of the United States, as hereinafter referred to, and the matter and controversy exceeds the value of $10,000.00, exclusive of interest and costs.

3. This action also arises under the Declaratory Judgment Act (28 U.S.C. Chap. 151) and the Administrative Procedure Act (5 U.S.C. Chap. 7).

4. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331, 1337, 1361, and 2201, and 5 U.S.C. 701 et seq.

The Parties

5. The plaintiff Physicians National House Staff Association (hereinafter "PNHA") is a voluntary, unincorporated national labor organization, with local

chapters and affiliates, which represents over 18,000 interns, residents and fellows (sometimes hereinafter collectively referred to as "house staff" or "house staff officers"), who work, train, and are employed at hospitals throughout the United States. The PNHA, and its chapters and affiliates, represent such house staff in matters affecting, inter alia, the wages, hours, and other terms and conditions of employment of house staff officers.

6. Cedars-Sinai Medical Center (hereinafter referred to sometimes as "Cedars-Sinai" or sometimes as a "Hospital") is a voluntary not-for-profit hospital which is engaged in commerce and is an employer within the meaning of the Act. The house staff officers who work and train at Cedars-Sinai are employees

of Cedars-Sinai within the meaning of the Act. The plaintiff Cedars-Sinai House Staff Association (hereinafter referred to sometimes as "Cedars-Sinai HSA" or sometimes as a "local HSA") is a voluntary, unincorporated labor organization, which is affiliated with the PNHA, and which represents the house staff officers who work, train, and are employed at Cedars-Sinai. The plaintiff Cedars-Sinai HSA represents the Cedars-Sinai house staff in matters, inter alia, affecting the wages, hours and other terms and conditions of the employment of the Cedars-Sinai house staff, and is a labor organization within the meaning of the Act.

7. University of Chicago Hospitals and Clincis (hereinafter referred to sometimes as "U/Chicago" or sometimes as

a "Hospital") is a voluntary not-for-profit hospital which is engaged in commerce and is an employer within the meaning of the Act. The house staff officers who work and train at U/Chicago are employees of U/Chicago within the meaning of the Act. The plaintiff University of Chicago Hospitals and Clinics House Staff Association (hereinafter referred to sometimes as "U/Chicago HSA" or sometimes as a "local HSA") is a voluntary, unincorporated labor organization which represents the house staff officers who work, train, and are employed at University of Chicago. The plaintiff U/Chicago HSA represents U/Chicago house staff in matters, inter alia, affecting the wages, hours and other terms and conditions of the employment of the U/Chicago house staff,

and is a labor organization within the meaning of the Act.

8. St. Christopher's Hospital (hereinafter referred to sometimes as "St. Christopher's" or sometimes as a "Hospital") is a voluntary not-for-profit hospital which is engaged in commerce and is an employer within the meaning of the Act. The house staff officers who work and train at St. Christopher's are employees of St. Christopher's within the meaning of the Act. The plaintiff St. Christopher's House Staff Association (hereinafter referred to sometimes as "St. Christopher's HSA" or sometimes as a "local HSA") is a voluntary, unincorporated labor organization, which is affiliated with the PNHA, and which represents the house staff officers who work, train, and are employed at St. Christo-

pher's. The plaintiff St. Christopher's HSA represents the St. Christopher's house staff in matters, inter alia, affecting the wages, hours and other terms and conditions of the employment of the St. Christopher's house staff, and is a labor organization within the meaning of the Act.

9. St. Clare's Hospital and Health Center (hereinafter referred to sometimes as "St. Clare's" or sometimes as a "Hospital") is a not-for-profit voluntary hospital which is engaged in commerce and is an employer within the meaning of the Act. The house staff officers who work and train at St. Clare's are employees of St. Clare's within the meaning of the Act. The plaintiff Committee of Interns and Residents (hereinafter referred to sometimes as "CIR" or sometimes as a "local

HSA") is a voluntary, unincorporated labor organization, which is affiliated with the PNHA, and which represents the house staff officers who work, train, and are employed at St. Clare's. The plaintiff CIR represents St. Clare's house staff in matters, inter alia, affecting the wages, hours and other terms and conditions of the employment of that house staff, and is a labor organization within the meaning of the Act. The CIR also represents approximately 6,000 house staff officers at other non-profit voluntary and public hospitals in and about New York City, and has engaged in such representation since 1957. The CIR has negotiated and entered into collective bargaining agreements in connection with such representation, and was recognized and certified as a labor organization by

the New York State Labor Relations Board between 1966 and 1974 and was likewise so recognized and certified by the National Labor Relations Board (hereinafter "the Board") between 1974 and 1976.

10. The defendants are the Chairman and Members of the Board, an agency of the United States, charged by the Act with the authority, duty, and responsibility to administer and enforce the Act, and are officers, agents, and/or employees of the Board and of the United States.

Statutory Provisions

11. Section 2 of the Act (29 U.S.C. 152), provides as follows:

> "Sec. 2. When used in this Act -
> * * * * *
> (2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or pol-

itical subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

(5) The term 'labor organization' means any organization of any kind,

or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

* * * * *

(12) The term 'professional employee' means -

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and a study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes, or

(b) any employee, who (i) has completed the courses of specialized

intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

12. Section 8 of the Act (29 U.S.C. 158), provides as follows:

"Sec. 8. (a) It shall be an unfair labor practice for an employer -

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 9(a)."

13. Section 9 of the Act (29 U.S.C. 159), provides as follows:

"Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment...

(b) The Board shall decide in each case whether, in order to

assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof...

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board -

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a)...

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall

direct an election by secret ballot and shall certify the results thereof."

The Prior Proceedings

14. Each local HSA has duly and timely filed a petition for certification pursuant to Section 9(c) of the Act. The plaintiff Cedars-Sinai HSA filed such a petition on or about October 9, 1974. The plaintiff U/Chicago HSA filed such a petition on or about December 20, 1974. The plaintiff St. Christopher's HSA filed such a petition on or about November 19, 1974. The plaintiff CIR filed such a petition on or about February 5, 1975.

15. Each of the Hospitals raised one or more of the following objections to the aforesaid petitions: (i) that the house staff officers were not employees and the local HSA was not a labor organization within the Act; (ii) that the

house staff officers were supervisors excluded from the Act; and (iii) that the local house staff was not an appropriate collective bargaining unit within the Act.

16. Pursuant to Section 9(c) of the Act, hearings were conducted before Hearing Officers of Regional Offices of the Board on the petitions and objections filed as aforesaid. Hearings were conducted on November 8, 11, and 12, December 10, and 11, 1974, and January 7, 8, 9, and 17, and February 3, 4, and 5, 1975, in the Cedars-Sinai HSA certification proceeding. Hearings were conducted on 15 days in December, 1974, and January, February, and March, 1975, in the U/Chicago HSA certification proceeding. Hearings were conducted on December 18, 1974, and January 2, and 10, 1975 in the St. Chris-

topher's HSA certification proceeding. Hearings were conducted on March 10, 11, and 12, 1975, in the CIR certification proceeding.

17. Following the aforesaid hearings, and pursuant to §102.67 of the Board Rules and Regulations and Statement of Procedure, Series 8, as amended, by direction of the respective Regional Directors, the cases were transferred to the Board for decision.

18. With the permission of the Board, the PNHA filed and submitted an amicus curiae brief for the consideration of the Board with respect to the foregoing cases.

19. On or about September 3, 1975, the Board determined that the foregoing cases, involving the health care industry, presented issues of importance in

the administation of the Act and scheduled oral argument on all the cases to be heard by the Board on September 8, 1975. The PNHA was permitted and authorized by the Board to participate in said oral argument as amicus curiae.

20. By decision and order dated March 19, 1976, a majority of the defendants found that Cedars-Sinai interns, residents and fellows, "although they possess certain employee characteristics, are primarily students" and "not 'employees' within the meaning of Section 2(3) of the Act." The Board therefore determined that the Cedars-Sinai HSA was not a "labor organization" within the meaning of the Act and dismissed the petition. Board Member Fanning dissented. A copy of the aforesaid decision, order, and dissent is attached as Exhibit 1.

21. By decision and order dated April 22, 1976, a majority of the defendants found that U/Chicago interns and residents "are not unlike those interns and residents involved in Cedars-Sinai. Therefore, we conclude that they are primarily students..." The Board determined that U/Chicago house staff officers are not "employees" within the meaning of the Act and that the U/Chicago HSA was not a "labor organization" within the meaning of the Act, and dismissed the petition. Board Member Fanning dissented. A copy of the aforesaid decision, order, and dissent is attached as Exhibit 2.

22. By decision and order dated March 19, 1976, a majority of the defendants found that St. Christopher's residents "are not unlike those found in Cedars-Sinai, in terms of their relation-

ship with the Employer." The Board determined that St. Christopher's house staff officers are "primarily students" and "not employees" within the meaning of the Act and that the St. Christopher's HSA is not a "labor organization" within the meaning of the Act, and dismissed the petition. Board Member Fanning dissented and Board Member Walther did not participate. A copy of the aforesaid order, decision, and dissent is attached as Exhibit 3.

23. By decision and order dated April 20, 1976, a majority of the defendants found that St. Clare's medical residents "are essentially like those involved in Cedars-Sinai in terms of their relationship with their Employer." The Board determined that St. Clare's house staff officers are "primarily students"

and not "employees" within the meaning of the Act and dismissed the petition. Board Member Fanning dissented. A copy of the aforesaid order, decision, and dissent is attached as Exhibit 4.

24. The defendant Member Walther was appointed to the Board on November 19, 1975, after the September 8, 1975 oral argument before the Board. Prior to that time and since 1962, the defendant Walther had been a partner in the law firm of Morgan, Lewis and Bockius, Philadelphia, Pennsyvlania, which acted as counsel to St. Christopher's in opposition to the petition filed by the plaintiff St. Christopher's HSA. Upon information and belief, the defendant Walther did not participate in the proceedings of the Board relating to the certification petition of the plaintiff

St. Christopher's HSA, but did participate as a Board member in the other local HSA cases.

25. Pursuant to Section 102.65(e)(1) of the Rules and Regulations of the Board, Series 8, the PNHA as amicus curiae and each local HSA filed a petition for reconsideration with the Board wherein they complained, inter alia, of the participation of the defendant Walther in the proceedings before the Board involving the local HSA petitions for certification.

26. The petition for reconsideration of the plaintiff Cedars-Sinai HSA was denied by decision dated June 10, 1976, a copy of which is attached as Exhibit 5. The petition for reconsideration of the plaintiff U/Chicago HSA was denied by decision dated June 28, 1976, a copy of which is attached as Exhibit

6. The petition for reconsideration of the plaintiff St. Christopher's HSA was denied by decision dated June 17, 1976, a copy of which is attached hereto as Exhibit 7.

27. On or about November 8, 1976, a majority of the Board, Member Fanning dissenting, rendered its revised Decision and Order in Kansas City General Hospital and Medical Center, 225 NLRB No. 14A, a copy of which is attached as Exhibit 8. The Board there decided, sua sponte, that it was the intention of the majority of the Board, in the decisions of the Board involving each local HSA herein, to find and determine that state jurisdiction over residents, interns, and fellows has been preempted by the Act, that each of the States has been precluded "from exercising their power to regulate in this

area," and "that to extend them [house staff officers] collective-bargaining rights would be contrary to that very [national labor] policy."

The Facts

28. The record in each of the local HSA certification proceedings contains the following evidence, with no evidence to the contrary:

(i) All the house staff officers involved render medical services to patients at the Hospitals at which they work and train, and those house staff officers devote most of the time expended by them at their respective Hospitals to performing such services.

(ii) The services thus performed by house staff officers are subject to the direction and control of the Hospitals at which those services are performed.

(iii) The house staff officers involved receive salaries and/or stipends, and other forms of compensation and benefits, from the Hospitals are related institutions at which such services are performed by house staff.

(iv) The Hospitals are compensated or reimbursed for the services thus

performed by their house staff officers, by or on behalf of the recipients of those services.

The evidence and the weight of the evidence before the Board therefore establishes that the house staff at the Hospitals and represented by each local HSA are employees and/or professional employees within the meaning of the Act.

29. The house staff officers at the Hospitals are and at all material times have been employees for all relevant and material purposes, including but not limited to federal and state income taxation.

30. House staff officers at other institutions, engaged in work and training essentially like that of the house staff at the Hospitals, have been uniformly determined to be employees for all purposes, including but not limited to federal and state taxation, state and local voting residence, agency law, workman's compensa-

tion, federal veterans reemployment rights, and state and local labor relations legislation and regulation.

The Violations of Law

31. The purpose and intent of the Congress in the definition of the terms "employee," "professional employee," and "labor organization" in the Act, and in the extension of the Act to voluntary hospitals effective August 25, 1974 (Public Law 93-360), was to include within the scope and coverage of the Act such persons, including house staff officers, who are employees and who may also be trainees, apprentices, and/or students.

32. The standard utilized by the defendants, i.e., persons who are employees but are primarily students are excluded from the coverage of the Act, is contrary to and in direct violation of the Act and in excess of the jurisdiction of the Board

in that: (i) it is not a standard provided by or contained in the Act; (ii) it constitutes an exclusion from the Act which is not so provided nor so authorized as an exclusion by the Act; and (iii) it excludes from the Act a class of persons who are employees and/or professional employees intended by the Congress to be and in fact are covered by the Act.

33. The standard utilization by the defendants is, further, contrary to and in direct violation of the unambiguous mandate contained in Section 9(c)(1) of the Act that where a question of representation exists, the Board "shall direct an election by secret ballot and shall certify the results thereof" [29 U.S.C. 159(c)(1)].

34. THe standard utilized by the defendants is, further, contrary to and in direct violation of a clear legislative prohibition contained in Section 8(a)(5) of

the Act in that the action of the Board permits that which the Act expressly prohibits and proscribes, i.e., refusal by an employer "to bargain collectively with the representative of his employees" [29 U.S.C. 158 (a)(5)].

35. The standard utilized by the defendants is, further, contrary to and in direct violation of the due process and equal protection clauses of the Fifth Amendment to the United States Constitution in that, without just cause or reason therefor, it denies to theplaintiffs herein, the house staff officers they represent, and all other house staff officers, the rights and privileges accorded to all other employees covered by the Act, including but not limited to all other employees who may also be trainees, apprentices, and/or students and are not expressly excluded from the coverage of the Act.

36. The standard utilized by the defendants together with the preemptive effect which the Board has accorded to its determinations as hereinbefore set forth, purport and threaten to deny to each and every State and local government of the United States, the power, authority, and/or jurisdiction to regulate or otherwise deal effectively with the organization of house staff officers at voluntary hospitals for collective bargaining purposes, the conduct of collective bargaining with, by, or on behalf of house staff officers, labor disputes involving house staff officers, and/or strikes by house staff officers. At the same time, the defendants have failed, neglected, and refused to assume or exercise jurisdiction over the aforesaid matters under the Act. As a consequence of the foregoing, the States and the people thereof may be caused to be

without effective control or regulation of matters directly and substantially affecting their lives, safety and welfare in violation of the power reserved to the States and to the people thereof by the Tenth Amendment to the United States Constitution.

37. The participation of defendant Board Member Walther in the proceedings, as hereinbefore set forth, deprived and denied to the plaintiffs the fair and impartial hearing guaranteed to them by the applicable provisions of the due process and equal protection clauses of the Fifth Amendment of the United States Constitution and of the laws of the United States.

38. There is a genuine and serious controversy between the plaintiffs and the defendants herein as to the rights and status of house staff officers, working and training at the Hospitals, as employees within the Act, and as to the rights and

status of the plaintiffs as labor organizations within the Act, and the declaration and judgment of this court with respect to such controversy are required in order to settle and adjudicate that controversy.

39. The determinations of the defendants to dismiss the petition of each plaintiff local HSA are, for the reasons hereinbefore set forth and otherwise:

(i) arbitrary, capricious, an abuse of discretion, unreasonable, and otherwise not in accordance with law;

(ii) contrary to constitutional right, power, privilege, and immunity;

(iii) in excess of the statutory jurisdiction, authority, and/or limitations prescribed by the Act;

(iv) short of statutory right prescribed by the Act;

(v) clearly and directly contrary to

and in violation of the jurisdiction, authority, limitations, prohibitions, proscriptions, and rights prescribed by the Act;

(vi) a failure, refusal, and neglect by the defendants, as officers and employees of the United States or an agency thereof, to perform a duty imposed by law and owing to the plaintiffs;

(vii) without observance of procedure required by law;

(viii) unsupported by substantial evidence; and

(ix) unwarranted by the facts.

Plaintiffs' Damages and the Relief Sought

40. Unless otherwise ordered and directed by this court, the defendants will continue to fail, neglect and refus to comply with the provisions of the Act so as to assume and assert jurisdiction over and regulation of the plaintiffs as labor or-

ganizations and house staff officers as employees within the Act.

41. By reason of the action of the defendants as aforesaid, the plaintiffs, and each of them, and the house staff officers whom they represent, have suffered and will continue to suffer serious and irreparable damage to the rights and opportunities of the plaintiffs and house staff officers to organize collectively and to bargain by representatives of their own choice as to matters which vitally and directly affect their house, wages and other terms and conditions of employment. The action of the defendants as herein complained of has denied and will continue to deny to the plaintiffs and all house staff officers those rights guaranteed to them by virtue of the Act.

42. The determination of the defendants here complained of are final.

43. Plaintiffs have exhausted their administrative remedies.

44. The plaintiffs have no adequate remedy at law and have no means for the redress of the wrongs whereof the plaintiffs here complain.

WHEREFORE, plaintiffs pray that this Court:

1. Declare, adjudge, and order that the determinations of the defendants to dismiss the certification petition of each plaintiff local HSA herein, be vacated, annulled, and set aside as arbitrary, capricious, unreasonable, and contrary to law.

2. Declare and adjudge the plaintiffs to be labor organizations and the house staff officers they represent to be employees within the meaning of the Act.

3. Stay, prohibit and enjoin the defendants, pendente lite and permanently,

from continuing to fail, neglect and refuse to assert and assume jurisdiction over the plaintiffs as labor organizations and house staff officers as employees within the Act.

4. Order and direct the defendants to proceed to assume and assert jurisdiction over the plaintiffs as labor organizations and the house staff officers whom they represent as employees within the Act, and to process the petitions heretofore filed before the Board in accordance with the Act.

5. Order and direct the defendants to certify and file with this Court, together with their answer or any other pleading or motion to be filed by the defendants herein, copies of all of the papers and proceedings heretofore had before the Board and/or any of its regional officer with respect to the certification petition of each local HSA, including but not limited

to the transcripts of and exhibits in evidence in the hearings conducted thereon.

6. Grant such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

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Exhibit 6

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS. AN ORGANIZATIONAL UNIT OF THE UNIVERSITY OF CHICAGO

Employer

and

Case 13-RC-13599

UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS HOUSESTAFF ASSOCIATION

Petitioner

ORDER DENYING MOTION

On April 22, 1976, the National Labor Relations Board issued a Decision and Order[1/] in the above-entitled proceeding, finding that interns, residents, and fellows are not employees weithin the meaning of Section 2(3) of the Act. Further, the Board dismissed the petition inasmuch as no question affecting commerce existed concerning the representation of "employees" of the Employer within the

meaning of Section 9(c) of the Act.

Thereafter, on May 10, 1976, the Petitioner filed a motion for reconsideration contending, as to the Decision,[2/] that the Board, inter alia; ignored the legislative history of the professional employee definition in the National Labor Relations Act by failing to conclude that interns and residents are junion professional assistants to attending physicians; failed to consider the legislative history of the 1974 Health Care Admindments; failed to follow previous decision of the National Labor Relations Board involving student-employees and apprentices; failed to consider Federal Court and The Court decisions holding their interns and residents are employees and that their income is subject to taxation; and failed to give controlling weight to the admission by the University of Chicago that

intern and residents are temporary employees.

The Board having duly considered the matter,

IT IS HEREBY ORDERED that the Petitioner's motion for reconsideration be, and it hereby is, denied on the grounds that it is lacking in merit and the matters raised therein were previously considered and rejected by the Board.

Dated, Washington, D.C., June 20, 1976.

By direction of the Board.[3/]

Enid W. Weber
Associate Executive
Secretary

Footnotes

1/223 NLRB No. 154 (1976)(Member Fanning dissenting).

2/Member Walther finds no merit in the contention that his participation in the instant decision was disconsonant with proper ethical concepts. See his concurring opinion in the Board's Order Denying Motion in Cedars-Sinai Medical Center, 224 NLRB No. 90 (1976).

3/Member Fanning is of the view that the Board seriously erred in concluding that housestaff officers are not entitled to coverage under the Act and, for that reason, believes reconsideration, insofar as it pertains to those arguments of the movant that relate to the substance of the original Decision and Order in this case, is warranted.

Exhibit 7

BEFORE THE NATIONAL LABOR RELATIONS BOARD

ST. CHRISTOPHER's HOSPITAL FOR CHILDREN

and

Case No. 4-RC-11363

ST. CHRISTOPHER'S HOSPITAL HOUSE STAFF ASSOCIATION

ORDER DENYING MOTION

On March 19, 1976, the National Labor Relations Board issued a Decision and Order[1/] in the above-entitled proceeding, finding that interns residents, and clinical fellows are not employees within the meaning of Section 2(3) of the Act. Further, the Board dismissed the petition inasmuch as no question affecting commerce existed concerning the representation of employees of the Employer within the meaning of Section 9(c) of the Act.

Thereafter, on April 1, 1976, the Petitioner filed a Motion for Reconsideration[2/] styled "petitioner's Motion for

Leave to Reopen the Record; Reconsider the Case; and Rehear the Case", which motion contended, insofar as the merits of the Decision is concerned, that the Board, inter alia, erred in concluding that the legislative history of the Act did not compel a finding that house staff are professional employees under Section 2(12) of the Act, that the legislative history of the health care amendments did not compel the finding that house staff are employees, that the Board's findings were arbitrary and capricious, that the Board's findings violated substantive due process provisions of the U.S. Constitution, and that the Board erred in concluding that the relationship of house staff to the hospital is educational and has not employment component.

The Board[3/] having duly considered the matter:

IT IS HEREBY ORDERED that the Petitioner's Motion for Reconsideration be, and it hereby is, denied on the ground that the matters raised therein are either lacking in merit or were previously considered and rejected by the Board.

Dated, Washington, D.C., June 11, 1976.

By direction of the Board: 4/

Robert Voger
Deputy Executive Secretary

Footnotes

1/223 NLRB No. 58 (Member Fanning dissenting).

2/The Physicians National House Staff Association submitted an amicus curiae memoradnum which we have accepted and considered.

3/Member Walter did not participate in the collaberation of the motion.

4/Member Fanning would grant the motion on the substantive ground, and on that ground alone, that the Board erred in its decision to exclude House Staff officers from the coverage of the Act to which Congress clearly entitled them.

APPENDIX XII

Answer

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UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLUMBIA

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, CEDARS-SINAI HOUSE STAFF ASSOCIATION, UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS HOUSE STAFF ASSOCIATION, ST. CHRISTOPHER'S ASSOCIATION, and THE COMMITTEE OF INTERNS AND RESIDENTS,

Plaintiffs

v. Civil Action No. 77-0358

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN H. FANNING, individually and as Chairman and Members of and constituting the National

Labor Relations Board,

Defendants.

ANSWER

Defendants Betty Southard Murphy, Howard Jenkins, Jr., John a. Penello, Peter D. Walther, and John H. Fanning, individually and as Chairman and Members of the National Labor Relations Board, hereby answer the complaint as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The Board answers the specific allegations of the complaint as follows:

1. The Board is without knowledge as to the allegations of Paragraph 1 of the Complaint.

2. The Board denies the allegations of Paragraph 2.

3. The Board denies the allegations of Paragraph 3.

4. The Board denies the allegations of Paragraph 4.

5. The Board denies: (a) that plaintiff Physicians National House Staff Association (herein, "PNHA") is a "labor organization" within the meaning of the National Labor Relations Act (29 U.S.C. Sec. 151 et seq.)(herein, "the Act"); and (b) that the interns, residents, and fellows purportedly represented by PNHA are "employed" at hospitals or that PNHA and its chapters represent them "in matters affecting, inter alia, the wages, hours, and other terms and conditions of employment," insofar as the quoted phrases constitute allegations that residents, interns, and fellows are "employees" within the meaning of

the Act. The Board is without knowledge concerning the remaining allegations in Paragraph 5.

6. The Board admits that Cedars-Sinai Medical Center (herein, "Cedars-Sinai") is a voluntary not-for-profit hospital which is engaged in commerce and is an employer within the meaning of the Act. The Board denies (a) that the housestaff officers at Cedars-Sinai are "employees" within the meaning of the Act; (b) that plaintiff Cedars-Sinai House Staff Association (herein, "Cedars-Sinai HSA") is a "labor organization" within the meaning of the Act; and (c) that the interns, residents, and fellows purportedly represented by the Cedars-Sinai HSA are "employed" at Cedars-Sinai and that Cedars-Sinai HSA represents "housestaff in matters, inter alia, affecting the wages, hours and other terms and conditions of employment," insofar as the

phrases constitute allegations that residents, interns, and fellows are "employees" within the meaning of the Act. The Board is without knowledge concerning the remaining allegations in Paragraph 6.

7. The Board admits that University of Chicago Hospitals and Clinics (herein, "U/Chicago") is a voluntary not-for-profit hospital which is engaged in commerce and is an employer within the meaning of the Act. The Board denies (a) that the housestaff officers at U/Chicago; are employees within the meaning of the Act; (b) that plaintiff University of Chicago Hospital and Clinics House Staff Association (herein,"U/Chicago PSA") is a "labor organization" within the meaning of the Act; and (c) that the interns, residents, and fellows purportedly represented by the H/Chicago HSA are "employed" at U/Chicago and that U/Chicago HSA represents "housestaff in matters, inter alia, affecting the wages, hours and other terms and conditions of employment" insofar as the quoted phrases constitue allegations

that residents, interns, and fellows are "employees" within the meaning of the Act. The Board is without knowledge concerning the remaining allegations in Paragraph 7.

8. The Board admits that St. Christopher's Hospital (herein, "St. Christopher's) is a voluntary not-for-profit hospital which is engaged in commerce and is an employer within the meaning of the Act. The Board denies (a) that the housestaff officers at St. Christopher's are "employees" within the meaning of the Act; (b) that plaintiff St. Christopher's House Staff Association (herein, "St. Christopher's HSA") is a "labor organization" within the meaning of the Act; and (c) that the interns, residents, and fellows purportedly represented by the St. Christopher's HSA are "employed" at St. Christopher's and that St. Christopher's HSA are "employed" at St. Christopher's and that

St. Christopher's HSA represents "house-staff in matters, inter alia, affecting the wages, hours and other terms and conditions of employment" insofar as the quoted phrases constitute allegations that residents, interns, and fellows are "employees" within the meaning of the Act. The Board is without knowledge concerning the remaining allegations in Paragraph 8.

9. The Board admits that St. Clare's Hospital and Health Center (herein, "St. Clare's") is a voluntary not-for-profit hospital which is engaged in commerce and is an employer within the meaning of the Act. The Board denies (a) that the house-staff officers at St. Clare's are "employees" within the meaning of the Act; (b) that plaintiff Committee of Interns and Residents (herein, "CIR") is a "labor organization" within the meaning of the Act; (c) that the interns, residents, and

fellows purportedly represented by the CIR are "employed" at St. Clare's and that CIR represents "housestaff in matters, inter alia, affecting the wages, hours and other terms and conditions of employment" insofar as the quoted phrases constitute allegations that residents, interns, and fellows are "employees" within the meaning of the Act. The Board further states that where units of housestaff officers represented by CIR were certified by the Board, such certifications were granted pursuant to Stipulations for Certification Elections reached at the Board's Regional Office level and not reviewed by the Board itself. Such certifications were issued prior to the Board's decisions in the cases at issue in the action before this Court. The Board is without knowledge concerning the other allegations of Paragraph 9.

10. The Board admits the allegations

in Paragraph 10.

11. The Board admits the allegations in Paragraph 11.

12. The Board admits the allegations in Paragraph 12.

13. The Board admits the allegations in Paragraph 13.

14. The Board admits the allegations in Paragraph 14.

15. The Board admits the allegations in Paragraph 15.

16. The Board admits the allegations in Paragraph 16, excet that it denies that hearings were conducted on 15 days between December, 1974, and March, 1975, in the U/ Chicago case. Rather, the Board states that those hearings were conducted on 11 days in January and February, 1975.

17. The Board admits the allegations in Paragraph 17.

18. The Board admits the allegations

in Paragraph 18.

19. The Board admits the allegations in Paragraph 19.

20. The Board admits the allegations in Paragraph 20.

21. The Board admits the allegations in Paragraph 21.

22. The Board admits the allegations in Paragraph 22.

23. The Board admits the allegations in Paragraph 23.

24. The Board admits the allegations in Paragraph 24, except that it denies that Member Walther was appointed to the Board on November 19, 1975. The Board states that the correct date of his appointment is November 21, 1975.

25. The Board admits the allegations of Paragraph 25.

26. The Board admits the allegations of Paragraph 26.

27. The Board admits the allegations of Paragraph 27, except that it denies that Complaint Exhibit 8 is a copy of 225 NLRB No. 14A. A true copy of said decision is attached hereto as Appendix A.

28. The Board denies that the allegations of Paragraph 28 are an accurate statement of the uncontroverted evidence in the various HSA proceedings.

29. The Board is without knowledge concerning the allegations of Paragraph 29, but denies that housestaff officers are employees within the meaning of the Act.

30. The Board is without knowledge concerning the allegations of Paragraph 30, but denies that housestaff officers are employees within the meaning of the Act.

31. The Board admits that the purpose and intent of Congress in enacting Public Law 93-360 was to include employees

of non-profit hospitals within the scope of the Act. However, the Board denies the remaining allegations of Paragraph 31, and more specifically denies that house-staff officers are employees within the meaning of the Act.

32. The Board denies the allegations of Paragraph 32, and more specifically denies that "persons who are employees but are primarily students" was the standard used by the Board in determining the status of housestaff officers.

33. The Board denies the allegations of Paragraph 33.

34. The Board denies the allegations of Paragraph 34.

35. The Board denies the allegations of Paragraph 35.

36. The Board admits that state and local governments lack the authoity to regulate collective bargaining involving

housestaff officers at health care institutions subject to the Act. The Board further admits that it has determined that housestaff officers at such institutions are not entitled to collective bargaining rights. The Board otherwise denies the allegations of Paragraph 36.

37. The Board denies the allegations of Paragraph 37.

38. The Board admits that there is a controversy between plaintiffs and the Board. The Board denies the remaining allegations of Paragraph 38, and more specifically that this Court has jurisdiction in this matter.

39. The Board denies the allegations of Paragraph 39.

40. The Board denies the allegations of Paragraph 40.

41. The Board denies the allegations of Paragraph 41.

42. The Board denies the allegation of Paragraph 42, but states that its decisions are not "final orders" subject to judicial review under §§10(e) and 10(f) of the Act.

43. The Board admits the allegation of Paragraph 43.

44. The Board denies the allegation of Paragraph 44, insofar as such allegation charges that the Board has acted wrongfully in a manner contrary to law and in excess of its jurisdiction.

WHEREFORE, defendant deny that plaintiffs are entitled to any relief against defendants, and pray that the complaint be dismissed in its entirety.

Respectfully submitted,

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National Labor Relations Board

Dated at Washington, D.C.

this 2nd day of May, 1977.

APPENDIX XIII

Supplemental Complaint

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
----------x

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, CEDARS-SINAI HOUSE STASF ASSOCIATION, UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS HOUSE STAFF ASSOCIATION, ST. CHRISTOPHER'S HOSPITAL HOUSE STAFF ASSOCIATION, and THE COMMITTEE OF INTERNS AND RESIDENTS,

Plaintiffs,

-against-

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN A. PENELLO, PETER D. WALTHER, and JOHN H. FANNING, individually and as Chairman and Members of and constituting the National Labor Relations Board,

Defendants.
----------x

PROPOSED SUPPLEMENTAL COMPLAINT

Civil Action No. 77-358

The plaintiffs as and for their supplemental complaint incorporate by reference, as if more fully set forth herein, each and every allegation and

prayer for relief contained in the original complaint herein, and further allege as follows:

¶27A. The petition for reconsideration of the plaintiff CIR was denied by the Board (Member Fanning dissenting) by decision dated May 26, 1977, a copy of which is attached as Exhibit 8A, hereinafter referred to as "the May 26th decision."

¶27B. The aforesaid decision, together with the earlier decision of the Board in Kansas City General Hospital and Medical Center, supra, decided and determined issues of fact and law on bases and grounds which were never raised or argued before the Board by any of the parties to those proceedings or any of the plaintiffs herein, and without the Board ever having afforded any of said parties or any

of the plaintiffs herein an opportunity to be heard or to be represented by counsel with respect to the matters thus decided and determined by the Board.

¶27C. Upon information and belief, Member Walther on or about March 31, 1977 submitted his resignation as a member of the Board to the President of the United States effective June 30, 1977.

¶27D. Upon information and belief, on or before March 31, 1977, Member Walther made arrangements to return to the practice of law with the firm of Morgan, Lewis & Bockius in Philadelphia, Pennsylvania.

¶27E. Upon information and belief, said law firm of Morgan, Lewis & Bockius acted as counsel to St. Christopher's Hospital in opposition to the petition filed by the plaintiff St. Christopher's House Staff Association, and otherwise has

acted and will continue to act as legal counsel and representative of hospitals directly and substantially affected by and interested in the decisions and determinations of the Board affecting house staff officers, including the May 26th decision.

¶27F. Upon information and belief, Member Walther actively participated in the deliberations, determination, and preparation of the May 26th decision and the majority opinion thereon. Without the vote of Member Walther, no majority of the Board existed to support the grounds for the May 26th decision.

¶27G. On or about June 14, 1977 a letter was written by counsel for the CIR to the Board protesting the May 26th decision and demanding remediation thereof. A copy of the aforesaid letter is attached hereto as Exhibit 8B and all of the objec-

tions raised therein are incorporated by reference as if more fully set forth herein.

Respectfully submitted,

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APPENDIX XIV

Supplemental Answer

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, CEDARS-SINAI HOUSE STAFF ASSOCIATION, UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS HOUSE STAFF ASSOCIATION, ST. CHRISTOPHER'S HOSPITAL HOUSE STAFF ASSOCIATION, and THE COMMITTEE OF INTERNS AND RESIDENTS,

Plaintiffs,

v.

Civil Action No. 77-0358

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN A. PENELLO, PETER D. WALTHER, and JOHN H. FANNING, individually and as Chairman and Members of and constituting

the National Labor
Relations Board,

Defendants.

SUPPLEMENTAL ANSWER

Defendants Betty Southard Murphy, Howard Jenkins, Jr., John A. Penello, Peter D. Walther, and John H. Fanning, individually and as Chairman and Members of the National Labor Relations Board, hereby answer the supplemental complaint as follows:

FIRST DEFENSE

The Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

The supplemental complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

The Board answers the specific allegations of the supplemental complaint as

follows:

27A. The Board admits the allegations in Paragraph 27A.

27B. The Board denies the allegation of Paragraph 27 B.

27C. The Board admits that on March 20, 1977 Member Walther submitted his resignation as a member of the Board to the President of the United States, but denies that the resignation was to become effective on June 30, 1977. The Board states that Member Walther's resignation was submitted to become effective at the discretion of the President of the United States.

27D. The Board denies the allegations of Paragraph 27D.

27E. The Board admits that the law firm of Morgan, Lewis & Bockius acted as counsel to St. Christopher's Hospital in

proceedings before the Board leading to the Board's decision in St. Christoher's Hospital, 223 NLRB 166 (1976). The Board is without knowledge concerning the other allegations of Paragraph 27E.

27F. The Board admits the allegations of Paragraph 27F.

27G. The Board admits the allegations of Paragraph 27G.

Respectfully submitted,

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National Labor Relations Board

Dated at Washington, D.C.

This 30th day of June, 1977.

APPENDIX XV

Defendants' Motion for Dismissal or Summary Judgment

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

PHYSICANS NATIONAL HOUSE STAFF ASSOCIATION, CEDARS-SINAI HOUSE STAFF ASSOCIATION, UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS HOUSE STAFF ASSOCIATION, ST. CHRISTOPHER'S HOSPITAL HOUSE STAFF ASSOCIATION, and THE COMMITTEE OF INTERNS AND RESIDENTS,

Plaintiffs,

v.

Civil Action
No. 77-0358

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN A. PENELLO, PETER D. WALTHER, and JOHN H. FANNING, individually and as Chairman and Members of and consti-

tuting the National Labor Relations Board,

Defendants.

MOTION OF DEFENDANTS FOR DISMISSAL, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, the National Labor Relations Board hereby moves for dismissal of the complaint on the following grounds:

1. This Court lacks subject matter jurisdiction.

2. The complaint fails to state a claim upon which relief can be granted.

Alternatively, pursuant to Rule 12 and 56 of the Federal Rules of Civil Procedure, the National Labor Relations Board hereby moves for summary judgment as a matter of law.

Respectfully submitted,

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Dated at Washington, D.C.

This 15th day of July, 1977.

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ATTORNEY FOR DEFENDANTS

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF COLUMBIA

PHYSICIANS NATIONAL HOUSE STAFF ASSOCIATION, CEDARS-SINAI HOUSE STAFF ASSOCIATION, UNIVERSITY OF CHICAGO HOSPITALS AND CLINICS HOUSE STASF ASSOCIATION, ST. CHRISTOPHER'S HOSPITAL HOUSE STAFF ASSOCIATION, and THE COMMITTEE OF INTERNS AND RESIDENTS,

Plaintiffs,

v.

Civil Action
No. 77-0358

BETTY SOUTHARD MURPHY, HOWARD JENKINS, JR., JOHN A. PENELLO, PETER D. WALTHER, and JOHN H. FANNING, individually and as Chairman and Member of and constituting the National Labor Relations

Board,

Defendants.

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

For the purpose of the Court's consideration of the motion of the National Labor Relations Board for summary judgment, and for that purpose only, the Board accepts as true all of the facts alleged in the plaintiffs' complaint and supplemental complaint which concern matters outside the record of the Board's proceedings and decisions upon which this lawsuit is based, except that the Board states that Member Walther's resignation has not yet become effective and that he is continuing to serve as a Board Member as of the date of this motion.

To the extent that the Board's answer have denied allegations about matters

contained in this record of the Board's proceedings and decisions, the Board relies for those denials upon its proceedings and decisions which are before this Court.

Respectfully submitted,

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Dated at Washington, D.C.

This 15th day of July, 1977.